# DOCKET

No. 13-684

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| Title: | Larry D. Jesinoski, et ux., Petitioners<br>v.<br>Countrywide Home Loans, Inc., et al. |
| Docketed: | December 6, 2013 |
| Lower Ct: | United States Court of Appeals for the Eighth Circuit |
| Case Nos.: | (12-2202) |
| Decision Date: | September 10, 2013 |
| Rehearing Denied: | November 13, 2013 |

**Questions Presented**

| ~~Date~~ | ~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Dec 6 2013 | Petition for a writ of certiorari filed. (Response due January 6, 2014) |
| Jan 2 2014 | Order extending time to file response to petition to and including February 12, 2014. |
| Jan 23 2014 | Order extending time to file response to petition to and including March 14, 2014. |
| Mar 14 2014 | Response to petition from respondents Countrywide Home Loans, Inc., et al. filed. VIDED. |
| Apr 2 2014 | DISTRIBUTED for Conference of April 18, 2014. |
| Apr 2 2014 | Reply of petitioner Larry D. Jesinoski, and Cheryle Jesinoski filed. (Distributed) |
| Apr 21 2014 | DISTRIBUTED for Conference of April 25, 2014. |
| Apr 28 2014 | Petition GRANTED. |
| May 15 2014 | The time to file the joint appendix and petitioners' brief on the merits is extended to and including July 15, 2014. |
| May 16 2014 | The time to file respondents' brief on the merits is extended to and including September 16, 2014. |
| Jul 15 2014 | Joint appendix filed. (Statement of costs filed) |
| Jul 15 2014 | Brief of petitioners Larry D. Jesinoski, et ux. filed. |
| Jul 15 2014 | Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners. |
| Jul 15 2014 | Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents. |
| Jul 22 2014 | Brief amicus curiae of the United States filed. |
| Jul 22 2014 | Brief amici curiae of AARP, et al. filed. |
| Jul 22 2014 | Brief amici curiae of States of New York, et al. filed. |
| Aug 21 2014 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Sep 4 2014 | SET FOR ARGUMENT on Tuesday, November 4, 2014. |

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| Sep 8 2014 | Record requested from U.S.C.A. 8th Circuit. |
| Sep 15 2014 | Record received from U.S.C.A. 8th Circuit. 1-Box. |
| Sep 16 2014 | Brief of respondents Countrywide Home Loans, Inc., et al. filed. |
| Sep 17 2014 | Brief amici curiae of American Bankers Association, et al. filed. |
| Sep 19 2014 | CIRCULATED |
| Sep 23 2014 | Brief amicus curiae of Professor Richard R.W. Brooks filed. (Distributed) |
| Sep 23 2014 | Brief amicus curiae of Structured Finance Industry Group, Inc. filed. (Distributed) |
| Oct 14 2014 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| Oct 16 2014 | Reply of petitioners Larry D. Jesinoski, et ux. filed. (Distributed) |
| Nov 4 2014 | Argued. For petitioners: David C. Frederick, Washington, D. C.; and Elaine J. Goldenberg, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Seth P. Waxman, Washington, D. C. |
| Jan 13 2015 | Judgment REVERSED and case REMANDED. Scalia, J., delivered the opinion for a unanimous Court. |
| Feb 18 2015 | JUDGMENT ISSUED. |
| Feb 20 2015 | Record returned to U.S.C.A. 8th Circuit. 1 Box. |

# PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

13 – No. 684

Supreme Court, U.S.
FILED
DEC 6 - 2013
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IN THE
# Supreme Court of the United States

LARRY D. JESINOSKI AND CHERYLE JESINOSKI,
INDIVIDUALS,
*Petitioners*,

v.

COUNTRYWIDE HOME LOANS, INC.,
SUBSIDIARY OF BANK OF AMERICA N.A.,
D/B/A AMERICA'S WHOLESALE LENDER, ET AL.,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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December 6, 2013

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## QUESTION PRESENTED

The Truth in Lending Act provides that a borrower "shall have the right to rescind the transaction until midnight of the third business day following . . . the delivery of the information and rescission forms required under this section . . . by notifying the creditor . . . of his intention to do so." 15 U.S.C. § 1635(a). The Act further creates a "[t]ime limit for [the] exercise of [this] right," providing that the borrower's "right of rescission shall expire three years after the date of consummation of the transaction" even if the "disclosures required . . . have not been delivered." *Id.* § 1635(f).

The question presented is:

Does a borrower exercise his right to rescind a transaction in satisfaction of the requirements of Section 1635 by "notifying the creditor" in writing within three years of the consummation of the transaction, as the Third, Fourth, and Eleventh Circuits have held, or must a borrower file a lawsuit within three years of the consummation of the transaction, as the First, Sixth, Eighth, Ninth, and Tenth Circuits have held?

## PARTIES TO THE PROCEEDINGS

Petitioners Larry D. Jesinoski and Cheryle Jesinoski were the plaintiffs and the appellants in the proceedings below.

Respondents Countrywide Home Loans, Inc., a subsidiary of Bank of America N.A., d/b/a America's Wholesale Lender; BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A., a Texas Limited Partnership, formerly known as Countrywide Home Loans Servicing, L.P.; Mortgage Electronic Registration Systems, Inc., a Delaware Corporation; and John and Jane Does 1-10 were the defendants and the appellees in the proceedings below.

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Petitioners Larry D. Jesinoski and Cheryle Jesinoski respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## INTRODUCTION

This case arises from a mortgage lender's violation of the Truth in Lending Act and the homeowners' obstructed attempt to exercise their right under the Act to rescind the mortgage as a remedy for that lender's statutory violation. In the years preceding the housing crisis of 2008, many mortgage lenders violated the Act's disclosure requirements in tens of thousands of loan transactions. As a result, countless homeowners were lured into oppressive mortgages on the basis of false, misleading, or incomplete disclosures of material information about loans secured by their homes.

The Jesinoskis did not receive complete disclosures. They refinanced their home mortgage with Countrywide Home Loans, Inc., in 2007, but Countrywide failed to furnish the Jesinoskis all the information and disclosures required by the Act. The Act creates a "right to rescind" the loan transaction within "three business days" of the delivery of all the required disclosures. A borrower exercises that right simply "by notifying the creditor." 15 U.S.C. § 1635(a). The Act further provides that the right "shall expire three years" after the closing of the transaction, even if all the required disclosures have not been delivered. *Id.* § 1635(f). When the Jesinoskis sought to exercise their rescission right under the Act by sending their creditors a written notice, those creditors refused to honor their right. When the Jesinoskis brought individual suit to enforce the rescission, the courts below refused to recognize that they had validly rescinded

their mortgage. Instead, the courts below held that the Act required the Jesinoskis to file a lawsuit to rescind.

The Eighth Circuit has joined four other circuits in holding that, to exercise the right to rescind under Section 1635, a borrower must file a lawsuit within three years of the closing of the transaction. The courts of appeals are starkly divided on the issue. Three other circuits hold that, in accord with the plain text of Section 1635 and with its implementing regulation, notifying the creditor in writing is all that is required to exercise that right. The Eighth Circuit's holding to the contrary, shared by a majority of the circuits that have ruled on the issue, derives from a misinterpretation of the statutory text and a misreading of this Court's decision in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998). The resulting rule does violence to the statutory text, manufactures legal obstacles for homeowners seeking to vindicate their rights under a law that was enacted to protect them, and risks flooding the federal courts with thousands of needless lawsuits to accomplish rescissions that Congress intended to be completed privately and without litigation. In the order denying rehearing en banc, Judge Colloton explicitly recognized the circuit conflict (as have many others) and opined that only this Court can resolve it. App. 11a. Because of the deeply entrenched circuit split and the national and recurring importance of the issue, the petition should be granted.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-3a) is reported at 729 F.3d 1092. The opinion of the district court (App. 4a-9a) is not reported (but is available at 2012 WL 1365751).

## JURISDICTION

The court of appeals entered its judgment on September 10, 2013, and denied a petition for rehearing on November 13, 2013 (App. 10a-11a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, and of the Federal Reserve Board's Regulation Z are reproduced at App. 12a-19a.

## STATEMENT

### A. Statutory and Regulatory Background

Congress enacted the Truth in Lending Act "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing . . . practices." 15 U.S.C. § 1601(a). The Act therefore requires creditors to disclose to borrowers various terms of a credit transaction, including "finance charges, annual percentage rates of interest, and the borrower's rights." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998) (citing 15 U.S.C. §§ 1631, 1632, 1635, 1638).

Section 1635(a) provides that a borrower who secures the loan with a principal dwelling "shall have the right to rescind the transaction until midnight of the third business day following the consummation of

the transaction or the delivery of the information and rescission forms required under this section . . . whichever is later, by notifying the creditor . . . of his intention to do so." 15 U.S.C. § 1635(a). Section 1635(a) thereby creates an unconditional right to rescind for three days after the consummation of the transaction and, as a remedy for a creditor's violation of the Act's disclosure requirements, extends that right to rescind until three days following the ultimate delivery of the required disclosures.

A borrower's exercise of the right to rescind under Section 1635(a) sets in motion a series of automatic steps to unwind the transaction, imposing obligations on both the creditor and the borrower. When a borrower "exercises his right to rescind under [Section 1635(a)], he is not liable for any finance or other charge, and any security interest given by the [borrower] . . . becomes void upon such a rescission." *Id.* § 1635(b). Section 1635(b) next provides that, "[w]ithin 20 days after receipt of a notice of rescission, the creditor shall return to the [borrower] any money or property given as . . . downpayment . . . and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." *Id.* Subsequently, "[u]pon the performance of the creditor's obligations under this section, the [borrower] shall tender the property to the creditor," but, "[i]f the creditor does not take possession of the property within 20 days after tender by the [borrower], ownership of the property vests in the [borrower] without obligation on his part to pay for it." *Id.* These "procedures prescribed" by Section 1635(b) "shall apply except when otherwise ordered by a court." *Id.*

Although the Act originally extended the three-day rescission right until the creditor delivered proper

disclosures and notices, whenever that might be, Congress later limited to three years the time within which a borrower may exercise the right to rescind even if a creditor never delivers the disclosures required by the Act. *See* Act of Oct. 28, 1974, Pub. L. No. 93-495, § 405, 88 Stat. 1500, 1517 (codified at 15 U.S.C. § 1635(f)). Section 1635(f) thus provides that a borrower's "right of rescission shall expire three years after the date of consummation of the transaction . . . notwithstanding the fact that the information . . . required under this section or any other disclosures required under [the Act] have not been delivered to the [borrower]." 15 U.S.C. § 1635(f).

Regulation Z, which implements the Act,* confirms that, "[i]f the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation." 12 C.F.R. § 226.23(a)(3). That Regulation further explains that, "[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram, or other means of written communication." *Id.* § 226.23(a)(2).

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* The Act originally vested the Federal Reserve Board with authority to promulgate regulations implementing the Act. *See* Pub. L. No. 90-321, tit. I, §§ 103(b), 105, 82 Stat. 146, 147, 148 (1968). Under this authority, the Board promulgated Regulation Z, after notice and comment. *See* 12 C.F.R. pt. 226. The Consumer Financial Protection Act of 2010 transferred implementing authority from the Federal Reserve Board to the Consumer Financial Protection Bureau. *See* Pub. L. No. 111-203, tit. X, § 1061(b)(1), (d), 124 Stat. 1376, 1955, 2036, 2039 (2010) (codified at 12 U.S.C. § 5581(b)(1), (d)). The Bureau re-promulgated Regulation Z without substantive changes. *See* Interim Final Rule, *Truth in Lending (Regulation Z)*, 76 Fed. Reg. 79,768, 79,803-04 (Dec. 22, 2011) (promulgated at 12 C.F.R. § 1026.23).

**B. Factual Background**

On February 23, 2007, petitioners Larry and Cheryle Jesinoski refinanced the mortgage on their primary residence in Eagan, Minnesota, by executing a promissory note for $611,000 with Countrywide Home Loans, Inc. App. 5a. At the closing of the transaction, the creditor provided some of the disclosures required by the Act, but in violation of the Act failed to include two copies of a Notice of Right to Cancel for each of the Jesinoskis and two copies of a Truth in Lending Disclosure Statement. *See* Am. Compl. ¶¶ 19-20 (Dkt. No. 7); *see also* 12 C.F.R. § 226.23(b) ("[A] creditor shall deliver *two copies* of the notice of the right to rescind *to each consumer entitled to rescind*") (emphases added); *id.* § 226.17(d) ("If the transaction is rescindable . . . , the disclosures shall be made *to each consumer who has the right to rescind.*") (emphasis added). The creditors never delivered the additional required disclosures. App. 5a.

On February 23, 2010, within the three-year limitation period set by Section 1635(f), the Jesinoskis exercised their right to rescind the transaction by sending written notice of rescission to respondents. *Id.* On March 12, 2010, respondent Bank of America Home Loans replied to the Jesinoskis' notice of rescission refusing to acknowledge the rescission. *Id.* No other interested party responded to the Jesinoskis' notice of rescission. *See* Am. Compl. ¶ 33 (Dkt. No. 7). The creditors subsequently failed to take, within 20 days of receipt of the notice of rescission, any of the steps required by Section 1635(b) to reflect the termination of the security interest in the Jesinoskis' home. *See id.* ¶ 31.

### C. Proceedings Below

On February 24, 2011, the Jesinoskis filed a complaint in the United States District Court for the District of Minnesota seeking to enforce the rescission they had exercised by notifying their creditors in writing of their intention to rescind. App. 5a-6a. Their amended complaint, filed on July 22, 2011, sought a declaration that the mortgage transaction had been rescinded by that written notice, damages under Section 1640 for respondents' violations of the Act, and damages under state-law causes of action arising from violations of federal mortgage regulatory law. App. 6a. Respondents answered and moved for judgment on the pleadings on the ground that the Jesinoskis' suit was barred because the complaint was filed more than three years after the consummation of the transaction. App. 7a-9a.

The district court granted respondents' motion. App. 9a. Following other decisions in the district, it held that "a suit for rescission filed more than three years after consummation of an eligible transaction is barred by [the Act's] statute of repose" in Section 1635(f). *Id.* Because "there is no dispute that [the Jesinoskis] failed to file suit within the three-year period," the court held that "their claims are time barred." *Id.*

The Jesinoskis appealed to the Eighth Circuit, which affirmed the district court's judgment. The per curiam opinion noted that the Eighth Circuit "recently weighed in on the circuit split regarding this precise issue and held that a party seeking to rescind a loan transaction must file suit within three years of consummating the loan." App. 2a (citing *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 726-29 (8th Cir. 2013)). On that ground alone, the court of

appeals "affirm[ed] the district court's judgment on the pleadings in favor of the lenders." *Id.*

Two members of the panel each concurred separately to express their views that the Eighth Circuit's precedent compelled the wrong result. Judge Melloy wrote that, "[w]ere we writing on a clean slate, . . . I would hold . . . that sending notice within three years of consummating a loan is sufficient to 'exercise' the right to rescind." App. 2a-3a (Melloy, J., concurring in the judgment) (citing 12 C.F.R. § 1026.23(a)(2)). Judge Colloton wrote that he "believe[s] that *Keiran* . . . was wrongly decided . . . and I would reverse the judgment of the district court if the question presented were open in this circuit." App. 3a (Colloton, J., concurring).

The Jesinoskis petitioned for rehearing en banc, which the Eighth Circuit denied by a vote of 6 to 4. App. 10a. Judge Colloton, concurring in the denial of rehearing en banc, again wrote separately to emphasize the need for this Court's intervention:

> No matter how this court decides this case, there will remain a well-developed conflict in the circuits on the question how a consumer may exercise his or her right to rescind under the Truth in Lending Act, 15 U.S.C. § 1635(f). *Compare Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255 (3d Cir. 2013), *and Gilbert v. Residential Funding LLC*, 678 F.3d 271, 277-78 (4th Cir. 2012), *with Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1187-88 (10th Cir. 2012), *and McOmie-Gray v. Bank Am. Home Loans*, 667 F.3d 1325, 1328 (9th Cir. 2012). It appears that none of these cases was presented to the Supreme Court by way of petition for writ of certiorari, so it cannot be said that the Court has resolved to

> leave the issue to individual circuits despite a conflict in authority. Therefore, I conclude that the resources of a rehearing en banc are not warranted at this time simply to move this court from one side to the other in what may prove to be a short-lived conflict in the circuits.

App. 11a (Colloton, J., concurring in denial of rehearing en banc).

## REASONS FOR GRANTING THE PETITION

### I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER WHETHER A BORROWER EXERCISES THE RIGHT TO RESCIND UNDER SECTION 1635 BY NOTIFYING A CREDITOR OR INSTEAD MUST FILE SUIT

The Eighth Circuit's decision in this case deepens a significant conflict among eight circuits by holding that a borrower must file suit within three years of the consummation of a loan to exercise his right to rescind the transaction under Section 1635. The Third, Fourth, and Eleventh Circuits properly rejected such a requirement, holding that the plain text of the statute and its implementing regulation dictate that written notice to the creditor is sufficient, and that neither the statute nor the regulation makes any mention of a further requirement to sue within the three-year time limit. The Eighth Circuit's holding, shared by the First, Sixth, Ninth, and Tenth Circuits, looks past the text of the statute and regulation, "[e]xtrapolating" from this Court's decision in *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 412 (1998), to impose a requirement that under Section 1635(f) "the [borrower] must file a rescission action in court" within three years. *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 728 (8th Cir. 2013). This Court's review is required to resolve this stark division in authority

and to establish uniform national requirements for a borrower's exercise of the right to rescind under Section 1635.

### A. The Third, Fourth, And Eleventh Circuits Hold That Notifying A Creditor In Writing Within Three Years Of The Consummation Of The Transaction Is Sufficient To Exercise The Right To Rescind

1. *Third Circuit.* In *Sherzer v. Homestar Mortgage Services*, 707 F.3d 255 (3d Cir. 2013), the Third Circuit held on facts identical to those here that written notice to a creditor is sufficient to exercise the right to rescind under Section 1635. There, as here, the homeowners notified their creditors in writing of their intention to rescind the loan within three years of its consummation but did not file suit until after the three-year period had expired. *Id.* at 256. The court held that written notice was sufficient because "the text of [Section] 1635 and its implementing regulation . . . supports the view that to timely rescind a loan agreement, [a borrower] need only send a valid notice of rescission." *Id.* at 258. The court explained that "[n]either [Section] 1635(a) nor Regulation Z states that the [borrower] must also file suit; both refer exclusively to written notification as the means by which [a borrower] exercises his right of rescission," *id.*, and therefore rejected the creditor's invitation to "infer that the statute contains additional, unwritten requirements with which [borrowers] must comply," *id.* at 261. Accordingly, the court held that "[a borrower] exercises his right of rescission by sending the creditor valid notice of rescission, and need not also file suit within the three-year period." *Id.*

2. *Fourth Circuit.* In *Gilbert v. Residential Funding LLC*, 678 F.3d 271 (4th Cir. 2012), the Fourth Circuit similarly relied upon "the plain meaning of the applicable statute and regulation" to hold that a borrower exercises the right to rescind by notifying a creditor. *Id.* at 278. There, as in *Sherzer* and as here, the homeowner sent written notice of rescission within three years of the consummation of the loan but filed suit after three years. The *Gilbert* court explained that, "[s]imply stated, neither [Section] 1635(f) nor Regulation Z says anything about the filing of a lawsuit, and we refuse to graft such a requirement upon them." *Id.* at 277. The court therefore held, in accord with the Third Circuit, that "a borrower exercises her right of rescission by merely communicating in writing her intention to rescind." *Id.*

3. *Eleventh Circuit.* The Eleventh Circuit reached the same conclusion in *Williams v. Homesake Mortgage Co.*, 968 F.2d 1137 (11th Cir. 1992). Although the homeowner in that case had both notified the creditor in writing and filed suit before the expiration of the three-year time limit, the Eleventh Circuit unmistakably held that written notice alone is sufficient to exercise the right to rescind. "Congress provided the consumer with the right to rescind a credit transaction . . . *solely* by notifying the creditor within set time limits of his right to rescind." *Id.* at 1139 (emphasis added). In modifying the default procedures established by Section 1635(b) to unwind the transaction, the court explained that "all that a consumer need do is notify the creditor of his intent to rescind [and] [t]he agreement is automatically rescinded." *Id.* at 1140. The *Williams* court further explained that Regulation Z "reaffirm[ed] . . . the Act's

intent to make rescission automatic upon notification." *Id.* at 1142. *See also Johnson v. Mortgage Elec. Registration Sys., Inc.*, 252 F. App'x 293, 294 (11th Cir. 2007) (per curiam) (explaining that a "borrower can trigger rescission 'solely by notifying the creditor within set time limits of [her] intent to rescind'" but holding that the borrower in that case had failed to do so) (citing *Williams v. Homesake Mortgage*) (alteration in original).

District courts in the Eleventh Circuit have followed *Williams v. Homesake Mortgage* in holding that written notice alone is sufficient to exercise the right to rescind. *See, e.g., Carson v. Wells Fargo Bank, N.A.*, No. 8:10-CV-2362-T17-EAJ, 2011 WL 2470099, at *3 (M.D. Fla. June 20, 2011) ("Rescission is automatic once the creditor is notified. . . . [B]ecause notifying the creditor automatically triggers rescission, it is this notification, not the filing of the suit, that must be within the three-year period.") (citing *Williams v. Homesake Mortgage*); *Williams v. Saxon Mortg. Co.*, Civil Action No. 06-0799-WS-B, 2008 WL 45739, at *3 (S.D. Ala. Jan. 2, 2008) ("[A]ll that the consumer need do is notify the creditor of his intent to rescind. The agreement is then automatically rescinded and the creditor must . . . tender first.") (quoting *Williams v. Homesake Mortgage*).

### B. The First, Sixth, Eighth, Ninth, And Tenth Circuits Hold That A Borrower Must File Suit Within Three Years Of The Consummation Of The Transaction To Exercise The Right To Rescind

The First, Sixth, Eighth, Ninth, and Tenth Circuits depart from this straightforward interpretation of the statutory text and its implementing regulation, instead requiring that a borrower must file a lawsuit

within three years to exercise the right to rescind. Those courts of appeals "[e]xtrapolat[e]," *Keiran*, 720 F.3d at 728, such a rule from this Court's decision in *Beach*, which held that a homeowner who had neither notified a creditor nor brought suit within the three-year time limit could not then assert rescission as an affirmative defense to a foreclosure action brought years later by the creditor.

1. *Ninth Circuit.* In *McOmie-Gray v. Bank of America Home Loans*, 667 F.3d 1325 (9th Cir. 2012), the Ninth Circuit held that "[Section] 1635(f) is a three-year statute of repose, requiring dismissal of a claim for rescission brought more than three years after the consummation of the loan . . . regardless of when the borrower sends notice of rescission." *Id.* at 1326. The court conceded that, "[w]ere [it] writing on a blank slate, [it] might consider whether notification within three years of the transaction could extend the time limit imposed by [Section] 1635(f)." *Id.* at 1328. Instead, though, the court suggested that it was bound "under the case law of [the Ninth Circuit] and the Supreme Court," which in its view indicated that "rescission suits must be brought within three years of the consummation of the loan, regardless whether notice of rescission is delivered within that three-year period." *Id.*

The Ninth Circuit based its holding on this Court's statement in *Beach* that Section 1635(f) "talks not of a suit's commencement but of a right's duration," *Beach*, 523 U.S. at 417, and its conclusion that the Act "permits no federal right to rescind, defensively or otherwise, after the 3-year period of [Section] 1635(f) has run," *id.* at 419. The Ninth Circuit acknowledged that this Court in *Beach* held merely that "the [borrower] could not raise the right to rescind as a defense to the [creditor's] foreclosure

action after the three-year period had run" when the borrower had neither notified the creditor nor brought suit himself. *McOmie-Gray*, 667 F.3d at 1328. It nonetheless suggested that "[t]he language the Court used, however, broadly assumes that a three-year limitation governs cases where a borrower, as plaintiff, seeks rescission of the mortgage transaction." *Id.* at 1328-29. On the basis of this extension of *Beach*, the Ninth Circuit concluded that "Section 1635(f) is . . . not merely a statute of limitations – it completely extinguishes the underlying right itself," and therefore as "a statute of repose" it "represents an absolute three-year bar on rescission actions," even if the borrower had notified the creditor in writing within the three-year period. *Id.* at 1329.

2. *Tenth Circuit.* In *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012), the Tenth Circuit joined the Ninth Circuit in holding that "the mere invocation of the right to rescission via a written letter, without more, is not enough to preserve a court's ability to effectuate (or recognize) a rescission claim after the three-year period has run." *Id.* at 1182. Like the Ninth Circuit in *McOmie-Gray*, the Tenth Circuit "believe[d] that *Beach* [was] dispositive of the instant question" and that "the Supreme Court has definitively foreclosed – through the implicit instruction of *Beach* – any argument that a consumer may exercise her right to rescind" by notifying the creditor of his intention to rescind. *Id.* In the Tenth Circuit's view, the homeowner's "position is not consistent with the effect of a strict repose period – which *Beach* held that [Section] 1635(f) establishes *in this context* – one that operates to *completely* extinguish the right claimed *after it lapses*." *Id.*

The Tenth Circuit disregarded the Consumer Financial Protection Bureau's ("Bureau") interpretation of the statute and of Regulation Z, advanced in an *amicus* brief, that a borrower need not file suit to exercise the right to rescind, again on the basis of the perceived implications of *Beach*. According to that court, "part and parcel of the Court's vision of repose was the manner in which a rescission must be asserted during the repose period – that is, by invoking the power of the courts through litigation." *Id.* at 1186 n.10 (citing *Beach*, 523 U.S. at 415-16). To hold otherwise, the court supposed, "could conflict with the Court's conception of repose under [the Act], in that it would effectively create commercial uncertainty." *Id.* On this policy basis, the court rejected the agency's authoritative interpretation of the Act and of Regulation Z.

3. *Eighth Circuit.* In *Keiran v. Home Capital, Inc.*, the Eighth Circuit surveyed the split among its sister circuits before joining the Ninth and Tenth Circuits in "hold[ing] that a plaintiff seeking rescission must file suit, as opposed to merely giving the bank notice, within three years in order to preserve th[e] right [to rescind] under [Section] 1635(f)." 720 F.3d at 726-28. The court "[e]xtrapolat[ed] from *Beach*" to infer that, "to accomplish rescission within the meaning of [Section] 1635(f), the [borrower] must file a rescission action in court." *Id.* at 728. The court further disregarded the Bureau's interpretation of Regulation Z, suggesting that "while Regulation Z sets forth one of the things [a borrower] must do to rescind the loan – give written notice to the bank – it does not set forth the entirety of the things necessary to accomplish rescission." *Id.* As a result, the court felt free to impose the additional requirement that the borrower file suit within three years. *Id.*

Judge Murphy dissented, explaining that "[t]he majority decision is contrary to the plain language of [the Act], the congressional intent behind it, and the position of the agency responsible for enforcing it." *Id.* at 731 (Murphy, J., concurring in part and dissenting in part). She recognized that "[n]owhere in the [Act] is there any requirement that a consumer must file a lawsuit in order to exercise a right of rescission." *Id.*; *see id.* at 733 ("[The Act] contains no language even hinting that a lawsuit is required to exercise the right of rescission."). Judge Murphy further explained that "[t]he majority['s] suggest[ion] that *Beach* . . . compels a different interpretation of the statute . . . is puzzling," because "in *Beach* the homeowners had unquestionably not exercised their right of rescission within three years, either by providing the statutory notice or by filing a lawsuit as the majority advocates." *Id.* at 731. Accordingly, she understood that "*Beach* provides no answer to the question in this case." *Id.* at 732. For these reasons, she properly concluded that "[t]he plain language of [the Act], its implementing regulations, and its supporting policy rationale all support reading [Section] 1635 to mean what it says: that rescission is exercised when a consumer provides written notice to the lender." *Id.* at 736.

4. *Sixth Circuit.* In *Lumpkin v. Deutsche Bank National Trust Co.*, No. 12-2317, 2013 WL 4007760 (6th Cir. Aug. 6, 2013), the Sixth Circuit shared the Eighth, Ninth, and Tenth Circuits' view in holding that a borrower must file suit to exercise his right to rescind. The court there held that the letter the homeowner had sent to his creditors within the three-year period did not qualify as a notice of rescission, *id.* at *2, and further held that "[t]he three years defined by [Section] 1365(f) were over by the

time this suit was filed, and so [the borrower's] right to bring a rescission suit had expired, regardless of when and whether he notified the lender of his rescission within those three years," *id.* at *3. The Sixth Circuit has thus unmistakably indicated that it would join the Eighth, Ninth, and Tenth Circuits in holding that written notice is insufficient to exercise the right to rescind.

**5.** *First Circuit.* The First Circuit has not yet considered this issue in the context of enforcing a rescission, but it has held that a notification within the three-year period did not effect a rescission without suit being filed within the three years. In *Large v. Conseco Finance Servicing Corp.*, 292 F.3d 49 (1st Cir. 2002), the First Circuit reached the same conclusion in enforcing an arbitration provision in the loan agreement a homeowner had attempted to rescind via written notice to his creditor within three years. There, the court rejected the homeowner's argument that his letter notifying his creditors of his intention to rescind "in fact rescinded the transaction the moment it was mailed." *Id.* at 54. The First Circuit instead held that "neither [Section 1635] nor [Regulation Z] establishes that a borrower's mere assertion of the right of rescission has the automatic effect of voiding the contract." *Id.* Rather, the court suggested, "[t]he natural reading of this language is that the security interest becomes void when the [borrower] exercises a right to rescind that is available in the particular case, either because the creditor acknowledges that the right of rescission is available or because the appropriate decision maker has so determined." *Id.* at 54-55. The court further inferred that, if "a lender disputes a borrower's purported right to rescind," as was the case in *Large* and is the

case here, "the designated decision maker," there an arbitrator and here a court, "must decide whether the conditions for rescission have been met," and, "[u]ntil such a decision is made, the [borrower] ha[s] only advanced a claim seeking rescission." *Id.* at 55. The court limited the Eleventh Circuit's approach in *Williams v. Homesake Mortgage* to cases in which the creditor agreed that grounds for rescission existed, thus holding that written notice alone does not exercise the right to rescind unless "the grounds for rescission have been established, either by agreement or by an appropriate decision maker." *Id.*

### C. The Split Among The Courts Of Appeals Is Widely Recognized And Entrenched, And It Can Be Resolved Only By This Court

This entrenched conflict in authority is widely recognized among the courts of appeals. *See* App. 2a ("This Court recently weighed in on the circuit split regarding this precise issue."); *Keiran*, 720 F.3d at 726 ("Our sister circuits are split on this issue."); *Sherzer*, 707 F.3d at 258 (acknowledging circuit split); *Rosenfield*, 681 F.3d at 1187-88 (same); *Gilbert*, 678 F.3d at 276 (same); *see also* Saif Alaqili, Comment, *Striking a Balance: How Equitable Doctrine Restores the Purposes of TILA's Rescission Right*, 2013 U. Chi. Legal F. 711 (2013) (recognizing circuit split and advocating sufficiency of notice). As Judge Colloton recognized below in his opinion concurring in the denial of rehearing en banc, App. 11a, there is no realistic prospect that the courts of appeals will reconcile this "well-developed conflict" in authority without this Court's intervention. Accordingly, the Court should grant this petition to resolve the conflict.

## II. THE EIGHTH CIRCUIT'S HOLDING THAT A BORROWER MUST FILE SUIT TO EXERCISE THE RIGHT TO RESCIND UNDER SECTION 1635 IS IN ERROR

This Court's review is further warranted because the Eighth Circuit's holding is incorrect on the merits. The plain text of the statute, the structure and purpose of the Act, and the clear direction of the implementing regulation establish that "notifying the creditor" is sufficient to exercise the right to rescind under Section 1635 and that there is no further requirement to file suit within the three-year time limit. This Court should grant review to correct the Eighth Circuit's misinterpretation of the Act, its failure to afford proper regard to the Bureau's implementing regulation, and its misapplication of this Court's decision in *Beach*.

### A. Section 1635's Plain Text Establishes That Notice To A Creditor Is Sufficient To Exercise The Right To Rescind

The text of Section 1635(a) both creates a right of rescission and specifies the method of its exercise. The statute indisputably provides that the borrower "shall have the right to rescind the transaction." 15 U.S.C. § 1635(a). The statute further details the manner in which that right may be exercised by specifying that the borrower shall have the right to rescind "until midnight of the third business day" after the closing or the delivery of proper disclosures "by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so." *Id.* The clear meaning of this statutory text is that a borrower exercises his "right to rescind" a transaction "by notifying the creditor." *Id.*

Section 1635(f)'s text confirms that interpretation. That section creates a "time limit for [the] exercise of [the] right," *id.* § 1635(f), but does not restrict the manner in which that right may be exercised within that time limit. As this Court recognized in *Beach*, Section 1635(f) "says nothing in terms of bringing an action but instead provides that the 'right of rescission [under the Act] shall expire' at the end of the time period." 523 U.S. at 417. By addressing the "right's duration," *id.*, Section 1635(f) is simply silent regarding what a borrower must do within the time limit it establishes in order to exercise that right.

Beyond Section 1635(a)'s affirmative statement that a borrower exercises his right to rescind by "notifying the creditor" and Section 1635(f)'s notable silence on the issue, neither section gives any indication of a further requirement that the borrower must sue within the three-year time limit. Indeed, neither section even mentions a court or legal proceedings. *See Sherzer*, 707 F.3d at 260 ("[T]he absence of any reference to causes of action or the commencement of suits in [Section] 1635 also suggests that rescission may be accomplished without a formal court filing."); *Gilbert*, 678 F.3d at 277 ("Simply stated, neither [Section] 1635(f) nor Regulation Z says anything about the filing of a lawsuit, and we refuse to graft such a requirement upon them."); *see also Keiran*, 720 F.3d at 728 ("Regulation Z says nothing about filing suit."). This conspicuous absence is notable in a statute that elsewhere explicitly establishes legal causes of action. *See* 15 U.S.C. § 1640 (creating damages cause of action for violations of the Act and a statute of limitations thereto). Accordingly, Section 1635 does not impose a requirement that a borrower sue to exercise the right to rescind.

### B. The Structure And Purpose Of The Truth In Lending Act Confirm That Notice Alone Is Sufficient To Exercise The Right To Rescind

Congress designed the Act to effectuate rescission upon a borrower's notifying creditors without relying on the intervention of the courts. As an initial matter, there is no dispute that a borrower has an unconditional right to rescind under Section 1635(a) for three days after the closing of the transaction. No court has suggested that a borrower must file a lawsuit within three days to exercise that unconditional right. And it makes no sense to interpret that unconditional right to rescind as requiring only notice while interpreting the extended right to rescind, which is created by the very same clause in the very same sentence of Section 1635(a), as requiring the filing of a lawsuit. *See Sherzer*, 707 F.3d at 264. Such an incongruous interpretation of Section 1635(a) is unsupportable.

Moreover, Section 1635(b) establishes procedures to unwind the transaction "when [a borrower] exercises his right to rescind under [Section 1635(a)]," without mentioning or requiring the involvement of a court. 15 U.S.C. § 1635(b). Those procedures are triggered by the borrower "exercis[ing] his right" under Section 1635(a); that is, by "notifying the creditor." "When" the borrower "exercises his right," immediately and automatically he "is not liable for any finance or other charge." *Id.*; *see Williams*, 968 F.2d at 1140; *Semar v. Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699, 705-06 (9th Cir. 1986). Moreover, "upon such a rescission" that a borrower exercises by notifying his creditor, "any security interest . . . becomes void." 15 U.S.C. § 1635(b).

Those first steps proceed automatically upon notice of rescission, and the statute does not require the involvement of a court.

The next steps in Section 1635(b)'s default procedures are affirmatively inconsistent with a court proceeding. The statute specifies that, "[w]ithin 20 days after receipt of a notice of rescission, the creditor shall return" any "money or property given as earnest money, downpayment, or otherwise" and "shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." *Id.* The provision specifies that those procedures of Section 1635(b) are triggered by "receipt of notice of rescission," not by a lawsuit. Moreover, the time limits established here and elsewhere in Section 1635(b) are tied to the actions of the borrower and creditor, *see Keiran*, 720 F.3d at 733 (Murphy, J., concurring in part and dissenting in part), and are therefore inconsistent with those established for a legal action by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 12(a) (establishing times for responsive pleadings). The only reasonable interpretation of Section 1635, therefore, is that notice to a creditor triggers rescission, and the default unwinding procedures of Section 1635(b) follow in due course from that notice without requiring the initiation of a court proceeding.

The structure of the statute, including the unwinding procedures in Section 1635(b), reflects the Act's purpose. "[S]ection 1635 is written with the goal of making the rescission process a private one, worked out between creditor and debtor without the intervention of the courts." *Belini v. Washington Mut. Bank, FA*, 412 F.3d 17, 25 (1st Cir. 2005). The Eighth Circuit would instead channel all rescissions

into the legal system, flooding the courts with thousands of unnecessary lawsuits. That rule not only flouts the structure of Section 1635 generally and the procedures of Section 1635(b) specifically, it eviscerates the efficiencies of the Act by manufacturing thousands of needless lawsuits from a regime that was designed to process rescissions privately in the first instance and without the intervention of the courts.

### C. Regulation Z Removes All Doubt That Written Notice Is Sufficient To Exercise The Right To Rescind

Regulation Z resolves any remaining ambiguity regarding the interpretation of the Act in favor of the sufficiency of written notice. That regulation specifies that, "[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication." 12 C.F.R. § 226.23(a)(2). The Bureau's interpretation of the Act in Regulation Z, which makes clear that notifying a creditor is sufficient to exercise the right to rescind, is due deference. *See Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981) ("[A]bsent some obvious repugnance to the statute, the [Bureau's] regulation implementing [the Truth in Lending Act] should be accepted by the courts."). Because the text of Section 1635, which does not even mention a court proceeding, does not clearly preclude the Bureau's interpretation promulgated in Regulation Z, that interpretation of the statute is entitled to deference from this Court.

The Bureau has reiterated in numerous *amicus* briefs before the courts of appeals its view that a borrower need *only* notify a creditor to exercise the right to rescind. *See, e.g.*, Brief of the Consumer

Financial Protection Bureau as Amicus Curiae in Support of Plaintiff-Appellant and Reversal, *Rosenfield*, *supra*, No. 10-1442 (filed Mar. 26, 2012), 2012 WL 1074082. There, the Bureau confirmed that it interprets Section 1635 to require only notice to the creditor to exercise the right to rescind and that "[c]onsumers are not required also to sue their lender within the three-year period provided under [Section] 1635(f)." *Id.* at *14. The Bureau's interpretation in an *amicus* brief of its own regulations is itself entitled to deference. *See Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) ("[W]e find Regulation Z ambiguous as to the question presented, and must therefore look to the [Bureau's] own interpretation of the regulation for guidance in deciding this case.") (citation omitted); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation") (internal quotation marks omitted). Accordingly, the Court should accept the Bureau's interpretation of Section 1635 and Regulation Z to hold that notice to a creditor is sufficient to exercise the right to rescind.

### D. The Eighth Circuit's Reliance Upon *Beach* Is Misplaced

This Court's decision in *Beach*, on which the Eighth Circuit and several other circuits relied in departing from the clear meaning of Section 1635 and Regulation Z, is not to the contrary. *Beach* held that Section 1635(f) "permits no federal right to rescind, defensively or otherwise, after the 3-year period of [Section] 1635(f) has run." 523 U.S. at 419. The Court explained that Section 1635(f) "govern[s] the life of the underlying right" and "talks not of a suit's commencement but of a right's duration."

*Id.* at 417. Accordingly, because the homeowner in *Beach* had not attempted to exercise his right to rescind – by suit, by notifying the creditor, or by any other means – within the three-year period of Section 1635(f), that right was extinguished when that limitations period expired. *Id.*

That holding has no bearing on the question here. The Eighth Circuit failed to apprehend that the Jesinoskis do not seek to exercise an expired rescission right by filing their suit, as the homeowner in *Beach* had attempted to do by asserting an expired rescission right as an affirmative defense in a foreclosure action. Rather, as the Third, Fourth, and Eleventh Circuits recognize, the Jesinoskis already exercised their right within the three-year limitations period of Section 1635(f) by notifying their creditors, in accordance with the requirements of Section 1635(a).

This Court's decision in *Beach* in no way questions the legitimacy of that manner of exercising the right to rescind. As the Third Circuit explained in *Sherzer*, "nowhere in *Beach* does the Court address *how* [a borrower] must exercise his right of rescission within that three-year period." 707 F.3d at 262. Rather, "[t]he most that can be gleaned from [this Court's] oft-quoted statement" in *Beach* that the Act "permits no federal right to rescind, defensively or otherwise, after the 3-year period of [Section] 1635(f) has run," 523 U.S. at 419, is the unremarkable conclusion that, "however the right of rescission is to be exercised, it must be done within three years." *Sherzer*, 707 F.3d at 263. The Eighth Circuit, along with the Sixth, Ninth, and Tenth Circuits, were therefore mistaken to rely upon *Beach* as warrant to ignore the plain meaning of Section 1635 and Regulation Z.

## III. THIS CASE IS A SUPERIOR VEHICLE FOR ADDRESSING A RECURRING QUESTION OF GREAT NATIONAL IMPORTANCE THAT WARRANTS THIS COURT'S IMMEDIATE REVIEW

The issue presented in this petition implicates a matter of surpassing national importance in the aftermath of a housing crisis that triggered the worst economic downturn since the Great Depression. As the agency responsible for administering the Act has recognized, "[t]he mortgage market is the single largest market for consumer financial products and services in the United States." Final Rule, *Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z)*, 78 Fed. Reg. 10,902, 10,905 (Feb. 14, 2013). In September 2013, more than $13 trillion in mortgage debt remained outstanding in the domestic economy. *See* Board of Governors of the Federal Reserve System, *Mortgage Debt Outstanding* (updated Sept. 25, 2013), *at* http://www.federalreserve.gov/econresdata/releases/mortoutstand/current.htm (last visited Dec. 4, 2013). That massive market has been beset by defaults and foreclosures. *See* 78 Fed. Reg. at 10,906 ("[m]ortgage loan delinquency rates nearly doubled between 2007 and 2009," reaching nearly 10% in 2009); Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 Ohio St. L.J. 761, 764 (2010) (estimating 2.4 million foreclosures in 2009 and as many as 13 million by 2014). Rampant violations of the Act preceded the housing crisis, vastly increasing the number of borrowers eligible for rescission under the Act. *See* Lea Krivinskas Shepard, *It's All About the Principal: Preserving Consumers' Right of Rescission*

*Under the Truth in Lending Act*, 89 N.C. L. Rev. 171, 175 (2010) (stating that "TILA errors seemed surprisingly common, particularly during the early years of the mortgage bubble," and reporting that forensic auditing revealed "actionable mistakes in borrowers' disclosure documents . . . in as many as eighty percent of loans"). Clarification of the procedure that borrowers must follow to exercise their rights under the Act, especially when the majority of circuits would direct hundreds of thousands of rescission actions into federal court, warrants this Court's immediate attention.

This case is the ideal vehicle to resolve the question presented. The legal issue is cleanly presented and dispositive of the case. In contrast to other cases raising the same issue that may come before the Court, the district court granted respondents' motion for judgment on the pleadings solely on the procedural ground that the Jesinoskis' suit was time-barred, without reaching the merits of whether respondents had provided the information and disclosures required under the Act. *Compare* App. 7a n.3 ("[F]or the purposes of the present motion, the Court assumes without deciding that Plaintiffs have pled a plausible claim that they did not receive the required documents at the closing.") *with Sobieniak v. BAC Home Loans Servicing, LP*, 835 F. Supp. 2d 705, 709 (D. Minn. 2011) ("plaintiffs offer no evidence that their signatures on the cancellation notices and TILA disclosure do not mean what they say," and "a bald assertion . . . years later" to the contrary "is not sufficient to overcome the presumption" that they received the required disclosures), *aff'd sub nom. Keiran v. Home Capital, Inc.*, 720 F.3d 721 (8th Cir. 2013), *and Keiran v. Home Capital, Inc.*, Civil No. 10-4418

(DSD/JSM), 2011 WL 6003961, at *3 (D. Minn. Nov. 30, 2011) ("Bank of New York claims that no violations of the [Act] were evident on the face of the Keirans' loan documents. The court agrees."), *aff'd*, 720 F.3d 721 (8th Cir. 2013).

For these reasons, the Court should resolve the deeply entrenched conflict over the meaning of Section 1635 and provide clarity to homeowners seeking to vindicate their statutory rights.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 6, 2013

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 12-2202

LARRY D. JESINOSKI AND CHERYLE JESINOSKI, INDIVIDUALS,
*Plaintiffs-Appellants,*

v.

COUNTRYWIDE HOME LOANS, INC., SUBSIDIARY OF BANK OF AMERICA N.A., DOING BUSINESS AS AMERICA'S WHOLESALE LENDER, ET AL.,
*Defendants-Appellees.*

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Appeal from United States District Court
for the District of Minnesota – Minneapolis

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Submitted: December 11, 2012
Filed: September 10, 2013
[Published]

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Before LOKEN, MELLOY, and COLLOTON, Circuit Judges.

PER CURIAM.

Mortgagors Larry and Cheryle Jesinoski appeal the district court's grant of judgment on the pleadings to their lenders in a dispute regarding a $611,000 home loan. Three years to the day after consummating the loan, the Jesinoskis mailed notices to the lenders seeking to rescind the loan due to alleged violations of the Truth in Lending Act (TILA);

the lenders denied the Jesinoskis' requests to rescind. One year and one day after mailing the letters—now more than four years after consummating the loan—the Jesinoskis sued the lenders to rescind the loan. The sole issue on appeal is whether mailing a notice of rescission within three years of consummating a loan is sufficient to "exercise" the right to rescind a loan transaction pursuant to 15 U.S.C. § 1635(a) or, alternatively, whether a party seeking to rescind the transaction is required to file a lawsuit within the three-year statutory period.

This Court recently weighed in on the circuit split regarding this precise issue and held that a party seeking to rescind a loan transaction must file suit within three years of consummating the loan. *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 726-29 (8th Cir. 2013) (adopting the Tenth Circuit's view in *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012)); *see Hartman v. Smith*, ___ F.3d ___, No. 12-1947, 2013 WL 4407058 at *7-8 (8th Cir. Aug. 19, 2013) (following *Keiran*). "It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002). Accordingly, we affirm the district court's judgment on the pleadings in favor of the lenders.

MELLOY, Circuit Judge, concurring in the judgment.

I concur in the judgment insofar as this Court is bound by decisions of prior panels. *See Owsley*, 281 F.3d at 690. Were we writing on a clean slate, however, I would hold for the reasons stated in my separate concurrence in *Hartman*, 2013 WL 4407058 at *10-12, that sending notice within three years of con-

summating a loan is sufficient to "exercise" the right to rescind. *See* 12 C.F.R. § 1026.23(a)(2).

COLLOTON, Circuit Judge, concurring.

I concur in the per curiam opinion based on circuit precedent, but I believe that *Keiran v. Home Capital, Inc.*, 720 F.3d 721 (8th Cir. 2013), was wrongly decided, *see id.* at 731 (Murphy, J., dissenting); *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255 (3d Cir. 2013), and I would reverse the judgment of the district court if the question presented were open in this circuit.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 11-474 (DWF/FLN)

LARRY D. JESINOSKI AND CHERYLE JESINOSKI, INDIVIDUALS,
*Plaintiffs*,

v.

COUNTRYWIDE HOME LOANS, INC., D/B/A AMERICA'S WHOLESALE LENDER, SUBSIDIARY OF BANK OF AMERICA N.A., ET AL.,
*Defendants*.

[Filed April 19, 2012]

## MEMORANDUM OPINION AND ORDER

## INTRODUCTION

This matter is before the Court on a Motion for Judgment on the Pleadings brought by Defendants Bank of America, N.A. ("BANA") and Mortgage Electronic Registration Systems ("MERS") (together, "Defendants") (Doc. No. 13).[1] For the reasons set forth below, the Court grants Defendants' motion.

[1] According to Defendants, Countrywide HomeLoans, Inc. was acquired by BANA in 2008, and became BAC Home Loans Servicing, LP ("BACHLS"), and in July 2011, BACHLS merged with BANA. (Doc. No. 15 at 1 n.1.) Thus, the only two defendants in this case are BANA and MERS.

## BACKGROUND

On February 23, 2007, Plaintiffs refinanced their home in Eagan, Minnesota, by borrowing $611,000 from Countrywide Home Loans, Inc., d/b/a America's Wholesale Lender, a predecessor-in-interest of BANA. (Doc. No. 7, Am. Compl. ¶¶ 7, 15, 16 & 17.) MERS also gained a mortgage interest in the property. (*Id.* ¶ 25.)

Plaintiffs received a Truth in Lending Act ("TILA") disclosure and the Notice of Right to Cancel at the loan closing. (*Id.* ¶¶ 19, 20, Exs. A & B.) Plaintiffs allege that they received insufficient numbers of copies of the TILA notice and disclosure. (*Id.* ¶ 47.) Defendants assert that Plaintiffs signed the disclosures, each acknowledging the "receipt of two copies of NOTICE OF RIGHT TO CANCEL and one copy of the Federal Truth in Lending Disclosure Statement." (Doc. No. 16, Hanson Decl. ¶ 3, Exs. A & B.)[2] The Right to Cancel gave Plaintiffs until midnight on February 27, 2007 to rescind. (*Id.*) Plaintiffs did not exercise their right to cancel and the loan funded. Plaintiffs used their loan proceeds to "pa[y] off multiple consumer debts." (Am. Compl. ¶ 22.)

On February 23, 2010, Plaintiffs purported to rescind the loan by mailing a letter to "all known parties in interest." (*Id.* ¶ 30.) On March 12, 2010, BACHLS denied Plaintiffs' request to rescind. (*Id.* ¶ 32.) On February 24, 2011, Plaintiffs filed the

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[2] The Court properly considers these materials because they are necessarily embraced by the pleadings. *See Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). *See also* 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 3d § 1357. The Court notes that Plaintiff attached unsigned copies of the same documents to their Amended Complaint. (Am. Compl. ¶¶ 19, 20, Exs. A & B.)

present action. (Doc. No. 1, Compl.) By agreement of the parties, Plaintiffs filed their Amended Complaint on July 22, 2011. (Am. Compl.) In their Amended Complaint, Plaintiffs assert four causes of action: Count 1—Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*; Count 2—Rescission of Security Interest; Count 3—Servicing a Mortgage Loan in Violation of Standards of Conduct, Minn. Stat. § 58.13; and Count 4—Plaintiffs' Cause of Action under Minn. Stat. § 8.31. At the heart of Plaintiffs' action is their request that the Court declare the mortgage transaction rescinded and for statutory damages related to defendants' purported failure to rescind. Defendants now move for judgment on the pleadings with respect to all of Plaintiffs' claims.

## DISCUSSION

### I. Judgment on the Pleadings Standard

A court evaluates a motion for judgment on the pleadings under the same standard as a motion brought under Rule 12(b)(6). *See Ashley County v. Pfizer*, 552 F.3d 659, 665 (8th Cir. 2009); *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). In deciding a motion to dismiss pursuant to Rule 12(b)(6), a court assumes all facts in the complaint to be true and construes all reasonable inferences from those facts in the light most favorable to the complainant. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). In doing so, however, a court need not accept as true wholly conclusory allegations, *Hanten v. Sch. Dist. of Riverview Gardens*, 183 F.3d 799, 805 (8th Cir. 1999), or legal conclusions drawn by the pleader from the facts alleged. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). A court may consider the complaint, matters of public record, orders, materials embraced by the complaint, and

exhibits attached to the complaint in deciding a motion to dismiss under Rule 12(b)(6). *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999).

To survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). Although a complaint need not contain "detailed factual allegations," it must contain facts with enough specificity "to raise a right to relief above the speculative level." *Id.* at 555. As the United States Supreme Court recently reiterated, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," will not pass muster under *Twombly*. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 555). In sum, this standard "calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim]." *Twombly*, 550 U.S. at 556.

**II. Defendants' Motion**

Defendants have moved for judgment on the pleadings with respect to all of Plaintiffs' claims. All of Plaintiffs' claims stem from Defendants' alleged violation of TILA—namely, that Plaintiffs did not receive the required number of disclosures at the closing.[3] Because the Court concludes that Plaintiffs'

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[3] Plaintiffs' assertion that they did not receive the required number of disclosures is undermined by documents submitted by Defendants demonstrating that Plaintiffs signed the disclosure documents acknowledging receipt by each Plaintiff of sufficient copies. (*See* Hanson Decl. ¶ 3, Exs. A & B.) However, for purposes of the present motion, the Court assumes without deciding that Plaintiffs have pled a plausible claim that they did not receive the required documents at the closing.

TILA-based claims are time-barred, Defendants' motion is properly granted.

TILA imposes a three-year statute of repose on claims for rescission. *See* 15 U.S.C. § 1635(f). Here, Plaintiffs closed on the loan on February 23, 2007. (Am. Compl. ¶¶ 17-20; Hanson Decl. ¶ 3, Exs. A & B.) Thus, the three-year period expired on or around February 23, 2010. Plaintiffs argue that, because they sent Defendants a notice of rescission on February 23, 2010, their TILA-based rescission claims are timely. Defendants counter that Plaintiffs' suit is barred because Plaintiffs did not commence this action until February 24, 2011, approximately one year after the three-year period expired.

This Court and other courts in this district have recently considered the issue of whether a claim for rescission survives the three-year period if a borrower sends a rescission request within the three-year period, but fails to file suit until after the three-year period expires. *See Beaukes v. GMA Mortgage, LLC*, Civ. No. 10-4551, 2012 WL 1204635, at *2 (D. Minn. April 11, 2012); *Dietz v. Beneficial Loan and Thrift Co.*, Civ. No. 10-3752, 2011 WL 6739504, at *3-4 (D. Minn. Dec. 22, 2011); *Geraghty v. BAC Home Loans Servicing LP*, Civ. No. 11-336, 2011 WL 3920248, at *3 (D. Minn. Sept. 7, 2011); *Sobieniak v. BAC Home Loans Servicing, LP*, Civ. No. 11-110, 2011 WL 6122318, at *4-5 (D. Minn. Dec. 8, 2011). In each of these cases, the court concluded that a plaintiff's suit for rescission is barred by section 1635(f) if the suit is not filed within the statutory three-year period. *See Geraghty*, Civ. No. 11-336, 2011 WL 3920248, at *3 (noting a circuit split and no Eighth Circuit authority on the issue; siding with the majority and holding that a legal claim for rescission under section 1635

must be filed within the three-year statute of repose); *Sobieniak*, Civ. No. 11-110, 2011 WL 6122318, at *4-5 (noting that "[t]he majority of courts to address this question hold that such a suit is barred by § 1635(f)" and holding that the plaintiffs' claim was barred because they did not file suit until after the three-year period passed).

The Court echoes its decisions in *Beaukes* and *Dietz* and agrees with the decisions of both the *Geraghty* and *Sobieniak* courts insofar as they hold that a suit for rescission filed more than three years after consummation of an eligible transaction is barred by TILA's statute of repose. Here, there is no dispute that Plaintiffs failed to file suit within the three-year period. Thus, their claims are time-barred.

Because Plaintiffs cannot demonstrate that Defendants violated TILA, Plaintiffs' state-law claims likewise fail. Consequently, the Court grants Defendants' motion for judgment on the pleadings in its entirety. Defendants are thus entitled to judgment on all counts (Counts 1 through 4) of Plaintiffs' Amended Complaint.

**ORDER**

Based upon the foregoing, **IT IS HEREBY ORDERED** that Defendants' Motion for Judgment on the Pleadings (Doc. No. [13]) is **GRANTED**.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: April 19, 2012

s/ DONOVAN W. FRANK
DONOVAN W. FRANK
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 12-2202

LARRY D. JESINOSKI AND CHERYLE JESINOSKI, INDIVIDUALS,
*Appellants*,

v.

COUNTRYWIDE HOME LOANS, INC., SUBSIDIARY OF BANK OF AMERICA N.A., DOING BUSINESS AS AMERICA'S WHOLESALE LENDER, ET AL.,
*Appellees*.

Appeal from United States District Court
for the District of Minnesota – Minneapolis
(0:11-cv-00474-DWF)

[Filed: November 13, 2013]

**ORDER**

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Judges Murphy, Bye, Smith and Kelly would grant the petition for rehearing *en banc*.

Judge Gruender did not participate in the consideration or decision of this matter.

COLLOTON, Circuit Judge, concurring in denial of rehearing en banc.

No matter how this court decides this case, there will remain a well-developed conflict in the circuits on the question how a consumer may exercise his or her right to rescind under the Truth in Lending Act, 15 U.S.C. § 1635(f). *Compare Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255 (3d Cir. 2013), *and Gilbert v. Residential Funding LLC*, 678 F.3d 271, 277-78 (4th Cir. 2012), *with Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1187-88 (10th Cir. 2012), *and McOmie-Gray v. Bank Am. Home Loans*, 667 F.3d 1325, 1328 (9th Cir. 2012). It appears that none of these cases was presented to the Supreme Court by way of petition for writ of certiorari, so it cannot be said that the Court has resolved to leave the issue to individual circuits despite a conflict in authority. Therefore, I conclude that the resources of a rehearing en banc are not warranted at this time simply to move this court from one side to the other in what may prove to be a short-lived conflict in the circuits.

November 13, 2013

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The Truth in Lending Act, 15 U.S.C. § 1635, provides:

**§ 1635. Right of rescission as to certain transactions**

**(a) Disclosure of obligor's right to rescind**

Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Bureau, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Bureau, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

**(b) Return of money or property following rescission**

When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

**(c) Rebuttable presumption of delivery of required disclosures**

Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be

given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

**(d) Modification and waiver of rights**

The Bureau may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

**(e) Exempted transactions; reapplication of provisions**

This section does not apply to—

**(1)** a residential mortgage transaction as defined in section 1602(w)[1] of this title;

**(2)** a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property;

**(3)** a transaction in which an agency of a State is the creditor; or

**(4)** advances under a preexisting open end credit plan if a security interest has already been retained or acquired and such advances are in accordance with a previously established credit limit for such plan.

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[1] Section 1602(w) of this title, referred to in subsec. (e)(1), was redesignated section 1602(x) of this title by Pub. L. 111-203, title X, § 1100A(1)(A), July 21, 2010, 124 Stat. 2107.

**(f) Time limit for exercise of right**

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

**(g) Additional relief**

In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.

**(h) Limitation on rescission**

An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Bureau, or a comparable written notice of the rights of the obligor, that was

properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.

**(i) Rescission rights in foreclosure**

**(1) In general**

Notwithstanding section 1649 of this title, and subject to the time period provided in subsection (f) of this section, in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if—

**(A)** a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

**(B)** the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Bureau or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.

**(2) Tolerance for disclosures**

Notwithstanding section 1605(f) of this title, and subject to the time period provided in subsection (f) of this section, for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge

shall be treated as being accurate for purposes of this section if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $35 or is greater than the amount required to be disclosed under this subchapter.

**(3) Right of recoupment under State law**

Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.

**(4) Applicability**

This subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995.

2. Regulation Z of the Federal Reserve Board provides in relevant part:

**12 C.F.R. § 226.23 Right of rescission.**

(a) *Consumer's right to rescind.* (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section.[47]

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail,

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[47] For purposes of this section, the addition to an existing obligation of a security interest in a consumer's principal dwelling is a transaction. The right of rescission applies only to the addition of the security interest and not the existing obligation. The creditor shall deliver the notice required by paragraph (b) of this section but need not deliver new material disclosures. Delivery of the required notice shall begin the rescission period.

telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

(3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures,[48] whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

(4) When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

(b)(1) *Notice of right to rescind.* In a transaction subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy to each if the notice is delivered in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act). The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:

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[48] The term 'material disclosures' means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §§ 226.32(c) and (d) and 226.35(b)(2).

(i) The retention or acquisition of a security interest in the consumer's principal dwelling.

(ii) The consumer's right to rescind the transaction.

(iii) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(iv) The effects of rescission, as described in paragraph (d) of this section.

(v) The date the rescission period expires.

(2) *Proper form of notice.* To satisfy the disclosure requirements of paragraph (b)(1) of this section, the creditor shall provide the appropriate model form in Appendix H of this part or a substantially similar notice.

* * *

# OPPOSITION BRIEF

RECORD AND BRIEFS

Nos. 13-684, 13-705, 13-884

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IN THE

# Supreme Court of the United States

LARRY D. JESINOSKI AND CHERYLE JESINOSKI,
*Petitioners*,

*v.*

COUNTRYWIDE HOME LOANS, INC.,
SUBSIDIARY OF BANK OF AMERICA, N.A.,
D/B/A AMERICA'S WHOLESALE LENDER, *et al.*,
*Respondents*.

---

ALAN G. KEIRAN AND MARY JANE KEIRAN,
*Petitioners*,

*v.*

HOME CAPITAL, INC., *et al.*,
*Respondents*.

---

STEVEN J. SOBIENIAK AND VICTORIA MCKINNEY,
*Petitioners*,

*v.*

BAC HOME LOANS SERVICING, LP,
AS SUCCESSOR IN INTEREST TO
COUNTRYWIDE HOME LOANS SERVICING, LP, *et al.*,
*Respondents*.

---

ROCKY FUJIO TAKUSHI, INDIVIDUALLY AND AS TRUSTEE OF THE ALBERT G. TAKUSHI REVOCABLE LIVING TRUST DATED APRIL 11, 2007,
*Petitioner*,

*v.*

BAC HOME LOANS SERVICING, LP, *et al.*,
*Respondents*.

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**ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND NINTH CIRCUITS**

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## RESPONSE TO PETITIONS FOR CERTIORARI

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COUNSEL LISTED ON INSIDE COVER

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## QUESTION PRESENTED

The Truth in Lending Act provides that certain borrowers who secure a loan with a principal dwelling have an unconditional right to rescind that loan "until midnight of the third business day following the consummation of the transaction." 15 U.S.C. § 1635(a). After that three-day period expires, such borrowers may rescind the loan only if the creditor has not delivered "the information and rescission forms required under this section." *Id.* The Act provides for an "action in which it is determined that a creditor has violated" § 1635, *id.* § 1635(g), and provides for suit by the borrower to have a court "determine[]" whether the borrower has "a right of rescission," *id.* § 1640(a)(3). The Act further provides that the borrower's "right of rescission shall expire three years after the date of consummation of the transaction ... notwithstanding the fact that the information and forms required under this section or any other disclosures required under [the Act] have not been delivered to the [borrower]." *Id.* § 1635(f).

The question presented is:

When a borrower sends notice of rescission to a creditor after the expiration of the three-day unconditional rescission period and the lender disputes the existence of the condition precedent to the right to rescind, must the borrower sue for rescission before any right to rescind expires under the three-year statute of repose?

## RULE 29.6 STATEMENT

BAC Home Loans Servicing, LP is now known as Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, L.P. Bank of America, N.A. is wholly owned by Bank of America Corporation. Bank of America Corporation has no parent corporation, and no publicly held company owns 10% or more of Bank of America Corporation's stock.

Countrywide Home Loans, Inc., d/b/a America's Wholesale Lender, is a wholly owned subsidiary of Countrywide Financial Corporation, which in turn is a wholly owned subsidiary of Bank of America Corporation. Bank of America Corporation has no parent corporation, and no publicly held company owns 10% or more of Bank of America Corporation's stock.

Mortgage Electronic Registration Systems, Inc. is a wholly owned subsidiary of MERSCORP Holdings, Inc. MERSCORP Holdings, Inc. is a privately held company with two entities, Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac), holding more than a 10% interest. No other corporation owns 10% or more of MERSCORP Holdings, Inc.

The Bank of New York Mellon, as Trustee, is a wholly owned subsidiary of The Bank of New York Mellon Corp. The Bank of New York Mellon Corp. is a publicly held company; no publicly held company owns 10% or more of The Bank of New York Mellon Corp.'s stock.*

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* Home Capital, Inc. is listed as a respondent in the caption of the *Keiran* petition (No. 13-705). Upon a review of the district court docket, it appears that Home Capital, Inc. was never served, and it never entered an appearance in that case.

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IN THE

# Supreme Court of the United States

Nos. 13-684, 13-705, 13-884

LARRY D. JESINOSKI AND CHERYLE JESINOSKI,
*Petitioners*,

*v.*

COUNTRYWIDE HOME LOANS, INC.,
SUBSIDIARY OF BANK OF AMERICA, N.A.,
D/B/A AMERICA'S WHOLESALE LENDER, *et al.*,
*Respondents.*

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ALAN G. KEIRAN AND MARY JANE KEIRAN,
*Petitioners*,

*v.*

HOME CAPITAL, INC., *et al.*,
*Respondents.*

---

STEVEN J. SOBIENIAK AND VICTORIA MCKINNEY,
*Petitioners*,

*v.*

BAC HOME LOANS SERVICING, LP,
AS SUCCESSOR IN INTEREST TO
COUNTRYWIDE HOME LOANS SERVICING, LP, *et al.*,
*Respondents.*

---

ROCKY FUJIO TAKUSHI, INDIVIDUALLY AND AS TRUSTEE OF THE ALBERT G. TAKUSHI REVOCABLE LIVING TRUST DATED APRIL 11, 2007,
*Petitioner*,

*v.*

BAC HOME LOANS SERVICING, LP, *et al.*,
*Respondents.*

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**ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND NINTH CIRCUITS**

## RESPONSE TO PETITIONS FOR CERTIORARI

### INTRODUCTION

The petitions for certiorari arise from four cases that present the same question of law. In each, borrowers took out a sizeable mortgage refinance loan, secured by their primary residence. At or shortly after the loan closing, the borrowers signed acknowledgements that they received the disclosures required by the Truth in Lending Act (TILA). Just under three years (and, in one case, exactly three years) after the closing—usually after having failed to repay their mortgage loan for some time, and faced with an impending foreclosure—the borrowers notified their lender of their intent to rescind the loan, based on the lender's alleged failure to provide the required disclosures at the closing. The lender denied the request for rescission, usually providing the borrowers with copies of their signed acknowledgements. More than three years after the closing, the borrowers sued for rescission.

The common legal question in these cases is narrower than the question presented in each of the petitions. The question is not, as petitioners would have it, whether a borrower in all circumstances is required to file suit within the three-year statute of repose prescribed by 15 U.S.C. § 1635(f) in order to rescind a mortgage loan. Instead, the question presented in these cases is whether, when a borrower seeks to rescind his mortgage loan after TILA's three-day unconditional rescission period and the lender disputes the existence of the condition precedent to the borrower's right to rescind—specifically, a failure to provide the

required disclosures—the borrower must sue for rescission before any right to rescind "expire[s]" under 15 U.S.C. § 1635(f).

The decisions on review—as well as those of the courts of appeals that are in accord—correctly held that, in cases where the lender disputes the existence of the borrower's right to rescind, a borrower cannot unilaterally rescind his mortgage simply by notifying the lender of his intent to do so. Instead, the borrower must file suit within the three-year statute of repose. That holding is consistent with the text and purpose of TILA in particular, and statutes of repose more generally. It is also consistent with settled law governing the right of rescission. The contrary, minority rule adopted by certain other courts of appeals would indefinitely toll TILA's statute of repose until such time as the borrower sees fit to file suit, unsettling the lender's expectations and vitiating the certainty of title that Congress sought to ensure through enactment of the three-year statute of repose in § 1635(f).

Notwithstanding our view that the decisions on review are correct, respondents recognize that there is a well-developed, irreconcilable split among the courts of appeals on the narrow question presented here, which only this Court can resolve.

## STATEMENT

### A. Rescission Under TILA

1. Congress passed the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601 *et seq.*, to promote the "informed use of credit" by requiring "meaningful disclosure of credit terms," *id.* § 1601(a). TILA requires lenders to provide "clear and accurate disclosures of terms dealing with things like finance charges, annual

percentage rates of interest, and borrower's rights." *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998).

Often described by courts as a "hypertechnical" statute, *Marr* v. *Bank of Am., N.A.*, 662 F.3d 963, 964, 968 (7th Cir. 2011), whose provisions must be "absolutely complied with and strictly enforced," *Mars* v. *Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983), Congress's amendments to TILA over time have nonetheless "made manifest that although it had designed TILA to protect consumers, it had not intended that lenders would be made to face overwhelming liability for relatively minor violations," *McKenna* v. *First Horizon Home Loan Corp.*, 475 F.3d 418, 424 (1st Cir. 2007); *see also American Mortg. Network, Inc.* v. *Shelton*, 486 F.3d 815, 819 n.4 (4th Cir. 2007) (clarifying that its comment in *Mars* "was not to imply ... that the Act's requirements should not be reasonably construed and equitably applied").

As relevant here, the statute and its implementing regulations require that, subject to exceptions not relevant here, a lender provide to "each consumer whose ownership interest is or will be subject to [a] security interest," 12 C.F.R. § 1026.23(a)(1), two copies of a notice of the right to rescind (also referred to as the notice of right to cancel), *id.* § 1026.23(b)(1), and a TILA disclosure statement, outlining "the annual percentage rate, the method of determining the finance charge and the balance upon which a finance charge will be imposed, the amount of the finance charge, the amount to be financed, the total of payments, the number and amount of payments [and] the due dates or periods of payments scheduled to repay the indebtedness," 15 U.S.C. § 1602(v). These disclosures must be made "clearly and conspicuously in writing, in a form that the consumer may keep." 12 C.F.R. § 1026.17(a)(1).

Subject to exceptions not relevant here, when a borrower secures a loan with his principal dwelling, TILA provides for a "right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section ... whichever is later, by notifying the creditor, in accordance with the regulations of the Bureau, of his intention to do so." 15 U.S.C. § 1635(a). This right to rescind can arise in two circumstances, depending on when it is asserted.

First, TILA grants a borrower "an unconditional right of rescission for the first three days following the consummation of the transaction." *Thompson* v. *Irwin Home Equity Corp.*, 300 F.3d 88, 89 (1st Cir. 2002). This unconditional right is the central objective of § 1635: It provides a brief "cooling off" period for loans in which a borrower has granted a security interest on his primary residence as part of the deal. *See, e.g.*, 119 Cong. Rec. S2803, S2811 (daily ed. Feb. 20, 1973) (statement of Sen. Proxmire). This right can be invoked "for any reason or for no reason"—the borrower need not offer any explanation or allege any violation of TILA. *McKenna*, 475 F.3d at 421.

During this "three-business-day period after closing," the rescission process is simple and "straightforward," given that lenders cannot object, "loan funds typically have not been disbursed yet," and no security interests have been recorded. 75 Fed. Reg. 58,539, 58,547 (Sept. 24, 2010). And, because Congress required that this unconditional right be exercised quite quickly—within three days—§ 1635(a) calls for meeting that deadline simply by sending notice to the lender.

Upon notice from the borrower, the lender must execute the remedial steps prescribed in the statute to return the parties to the *status quo ante*. Specifically, within 20 calendar days after receipt of the notice of rescission, the lender must return any money or property given in connection with the transaction and take all necessary action to reflect the termination of the security interest. 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(2), 1026.23(d)(2). The borrower thereafter "is not liable for any finance charge or other charge, and any security interest given by the obligor ... becomes void upon such a rescission." 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(1), 1026.23(d)(1). When the lender has performed its obligations, the consumer must tender the money or property to the lender or, if that is impracticable or inequitable, must tender the property's reasonable value. 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(3), 1026(d)(3).

Second, outside of the initial three-business-day period, TILA provides another possibility for rescission, but only on the condition that "the creditor fails to deliver certain forms and to disclose certain information" at the loan closing—that is, when the lender has in fact violated TILA. *Thompson*, 300 F.3d at 89. The rescission process here can be (and frequently is) "problematic," given that funds have already been disbursed, security interests perfected, and, most importantly, the claimed right itself can be contested. *See, e.g.*, 75 Fed. Reg. at 58,547.

When a borrower asserts a right of rescission in this context, the lender may agree that it violated TILA and rescind the loan. In such cases, the borrower and lender may follow the statutory process for unwinding the mortgage described above. *Cf. Keiran* App. 12a n.4. But if the lender disputes that it failed to

deliver the requisite disclosures at closing, an adjudication of the parties' rights is required. *See, e.g.*, *Large* v. *Conesco Fin. Servicing Corp.*, 292 F.3d 49, 52 (1st Cir. 2002). Congress understood the need for such resolution and provided for litigation as part of a contested rescission: TILA recognizes the availability of an "action in which it is determined that a creditor has violated" § 1635, 15 U.S.C. § 1635(g), and an "action in which a person is determined to have a right of rescission under section 1635," *id.* § 1640(a)(3); establishes a "rebuttable presumption" that a borrower who signs an acknowledgement of receipt in fact received the required disclosure forms, *id.* § 1635(c); and expressly contemplates court orders in the rescission process, *id.* § 1635(b). Put differently, outside of the three-day "unconditional" rescission period, TILA does not impose any obligation on lenders to rescind a mortgage upon a borrower's unilateral demand.

2. As originally enacted in 1968, TILA provided no time limit on rescission outside the three-day "unconditional" period. *See* Consumer Credit Protection Act, Pub. L. No. 90-321, tit. I, § 125, 88 Stat. 153 (1968). That omission proved problematic.

As the Board of Governors of the Federal Reserve System and the National Commission on Consumer Finance emphasized to Congress, the uncertainty surrounding unexpired rights of rescission placed a cloud on title and the enforceability of loans. *See* Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1972* (Jan. 3, 1973) ("1973 FRB Report"), *reprinted in* 119 Cong. Rec. S2803, S2813 (daily ed. Feb. 20, 1973) (without "any limit on the length of time that the right continues where the creditor has failed to notify the customer of his right," "the titles to many residential

real estate properties may become clouded by uncertainty regarding unexpired rights of rescission"); Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1971*, at 19 (Jan. 3, 1972) ("1972 FRB Report") (same); National Commission on Consumer Finance, *Consumer Credit in the United States* 189-190 (Dec. 1972) ("*Consumer Credit*") ("The FRB pointed out in two previous reports that the rescission period runs indefinitely unless required disclosures have been made and notice of rescission provided. This clouds the titles to many residential properties and injures consumers in the long run."). The Federal Reserve Board and the National Commission therefore recommended to Congress that it enact a three-year "outside limit on the time the right of rescission may run." 1973 FRB Report, 119 Cong. Rec. at S2815; *see* 1972 FRB Report 19; *Consumer Credit* 190 (Congress should amend TILA to "limit the time the right of rescission may run where the creditor has failed to give proper disclosures.").

Following those recommendations, Congress amended the Act in 1974 to put a definitive end to that uncertainty. *See* Pub. L. No. 93-495, Title IV, § 405, 88 Stat. 1517 (1974), *as amended*, Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, Title VI, § 612(a)(6)). Congress added 15 U.S.C. § 1635(f), an "uncompromising provision" that categorically restricts the rescission right. *Beach*, 523 U.S. at 418. Section 1635(f) provides that the right "shall expire three years after the date of consummation of the transaction ... notwithstanding the fact that the information and forms required under this section or

any other disclosures required under [the Act] have not been delivered to the [borrower]." 15 U.S.C. § 1635(f).[1]

3. TILA originally delegated the responsibility for implementing and promulgating rules regarding the Act to the Federal Reserve Board. *See* Consumer Credit Protection Act, Pub. L. No. 90-321, Title I, § 105, 88 Stat. 153 (1968). In accordance with that grant of authority, the Federal Reserve Board in 1969 promulgated Regulation Z, TILA's implementing regulations. *See* 12 C.F.R. pt. 226.

The Federal Reserve Board administered TILA for the next 40 years, until the Dodd-Frank Wall Street Reform and Consumer Protection Act transferred the Federal Reserve Board's authority to the Consumer Financial Protection Bureau on July 21, 2011. *See* Pub. L. No. 111-243, §§ 1061(b)(1), (d), 124 Stat. 2079 (2010) (codified at 12 U.S.C. §§ 5581(b)(1), (d)); *Designated Transfer Date*, 75 Fed. Reg. 57,252, 57,252 (Sept. 20, 2010). In December 2011, the Bureau republished the Federal Reserve Board's Regulation Z as 12 C.F.R. § 1026 *et seq.* *See generally* 76 Fed. Reg. 79,768 (Dec. 22, 2011). Those regulations refer generally to a consumer's "right to rescind the transaction," without ref-

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[1] Section 1635(f), as enacted in 1974, applied in all circumstances. Congress thereafter recognized the need to defer the repose period deadline in one specific case: when "an agency institutes a formal proceeding" to enforce a borrower's rescission rights. 123 Cong. Rec. S9310, S9311 (daily ed. June 9, 1977) (statement of Sen. Riegel). As one senator explained, "Since a proceeding can take months, or even years, the rights of a consumer may be extinguished before a final order is issued." *Id.* Thus, in 1980, Congress added one narrow exception (not applicable here) to § 1635(f), deferring the deadline when an agency "institutes a proceeding" to enforce the provisions of § 1635. *See* Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, Title VI, § 612(a)(6), 94 Stat. 132.

erence to or discussion of the two periods during which rescission may be sought. 12 C.F.R. § 1026.23(a)(1). The regulations require at minimum that, "[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication." *Id.* § 1026.23(a)(2).

### B. Factual Background And Proceedings In The District Courts

*Keiran.* On December 30, 2006, petitioners Alan and Mary Jane Keiran entered into a refinance mortgage on their primary residence with Home Capital, Inc. by executing a promissory note for $404,000. *Keiran* App. 38a. At the loan closing, each petitioner signed disclosures acknowledging receipt of two copies of the notice of right to cancel and one copy of the Truth in Lending Disclosure Statement. *Id.* 41a n.4; Alvarado Aff. ¶¶ 9-10, Dkt. 15, No. 10-cv-4418, *Keiran* v. *Home Capital Inc.* (D. Minn. Aug. 12, 2011). "The Keirans stopped making payments on the [loan] in November 2008." *Keiran* App. 38a.

On October 8, 2009—34 months after the loan closing—the Keirans notified respondents of their intent to rescind, based on the Keirans' assertion that although they received the required disclosures at the closing, they allegedly did not receive the required number of copies of the disclosures. *Keiran* App. 38a. Respondent BAC Home Loans Servicing, LP replied to the notice on January 7, 2010, informing the Keirans that there was no basis for rescission. *Id.*

The Keirans filed suit on October 29, 2010, nearly four years after the loan closing. The complaint sought rescission of the mortgage, money damages, and a declaratory judgment voiding respondents' security inter-

est. Respondents moved for summary judgment. Rejecting the Keirans' "claim that their request for rescission was timely, because it was received by [respondents] within three years of the December 30, 2006, closing," the district court found that "the language of TILA, the holding in *Beach* and the strong public policy favoring certainty of title all support the majority view that Congress intended that any lawsuit to enforce the right of rescission be brought within the three-year repose period." *Keiran* App. 44a. The court rejected the Keirans' interpretation of TILA, under which "a borrower who sends a letter claiming some disclosure defect, but who does not file suit, has indefinitely tolled the rescission period. Such an interpretation is improper, because it contradicts Congress's intent to create a three-year rescission period." *Id.*

*Sobieniak.* On March 22, 2007, petitioners Stephen Sobieniak and Victoria McKinney entered into a refinance mortgage on their primary residence with respondent Countrywide Home Loans, Inc., by executing a promissory note for $562,000. *Keiran* App. 48a.[2] At the loan closing, each petitioner signed disclosures acknowledging receipt of two copies of NOTICE of RIGHT TO CANCEL and one copy of the federal Truth in Lending Disclosure Statement.'" *Id.* 48a-49a. Each petitioner "also signed and 'acknowledge[d] reading and receiving a complete copy of [the TILA disclosure statement].'" *Id.* 49a (alterations in original).

On January 15, 2010—34 months after the loan closing—petitioners notified respondents of their intent to

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[2] For ease of reference, respondents refer herein to the appendix to the joint petition for certiorari in *Keiran* and *Sobieniak* as the "*Keiran* App.," even when referring to lower-court decisions in *Sobieniak*.

rescind, based on petitioners' assertion that although they received the required disclosures at closing, they allegedly failed to receive the required number of copies of the disclosures. *Keiran* App. 3a, 49a. Respondent BAC Home Loans Servicing, LP replied to the notice on January 29, 2010, informing petitioners that there was no basis for rescission, and providing petitioners with "signed copies of the notices of right to cancel and TILA disclosures." *Id.* 49a; *see id.* 3a.

Petitioners Sobieniak and McKinney filed suit on January 14, 2011, nearly four years after the loan closing. The complaint sought rescission of the mortgage, money damages, and a declaratory judgment voiding respondents' security interest. Respondents moved to dismiss. The district court gave the parties notice of its intent to convert the motion to one for summary judgment and allowed the parties to submit evidence. The court then granted the converted motion. The court specifically found that petitioners each received the number of copies required under TILA. *Keiran* App. 53a. Further, relying on the district court decision in *Keiran*, the court held that petitioners' suit was barred in any event by the statute of repose because they "did not file suit until nearly four years after consummation of the transaction." *Id.* 56a.

*Jesinoski.* On February 23, 2007, petitioners Larry and Cheryle Jesinoski refinanced the mortgage on their primary residence by executing a promissory note for $611,000 with respondent Countrywide Home Loans, Inc. *Jesinoski* App. 5a. At the loan closing, each petitioner signed disclosures acknowledging "'receipt of two copies of NOTICE OF RIGHT TO CANCEL and one copy of the Federal Truth in Lending Disclosure Statement.'" *Id.*; *see also id.* 7a n.3. The Jesinoskis

used the proceeds of the loan to "'pa[y] off multiple consumer debts.'" *Id.* 5a (alteration in original).

On February 23, 2010, three years to the day after the loan closing, the Jesinoskis notified respondents of their intent to rescind the loan, on the ground that while Countrywide provided the required disclosures at closing, Countrywide allegedly failed to provide the required number of copies of the disclosures. *See Jesinoski* Pet. 6. At the time, the Jesinoskis' home was in foreclosure. Am. Compl. ¶¶ 3, 5, Dkt. 7, No. 11-cv-0474, *Jesinoski* v. *Countrywide Home Loans, Inc.* (D. Minn. July 22, 2011). On March 12, 2010, respondent BAC Home Loans Servicing, LP replied to the Jesinoskis' notice and refused to recognize the rescission. *Jesinoski* App. 5a. The Jesinoskis filed suit on February 24, 2011—four years and one day after the loan closed—but did not serve respondents with the complaint until "the last few days of the 120 days for service mandated by Fed. R. Civ. P. 4(m)." Letter from Pls.' Counsel, Dkt. 3, No. 11-cv-0474, *Jesinoski* v. *Countrywide Home Loans, Inc.* (D. Minn. July 8, 2011). The Jesinoskis filed an amended complaint on July 22, 2011, seeking a declaration that the mortgage transaction had been rescinded by their February 23, 2010 written notice as well as damages for respondents' alleged violations of TILA.

Respondents moved for judgment on the pleadings on the ground that the Jesinoskis' suit was barred by TILA's three-year statute of repose, as the complaint was filed more than four years after the loan closed. The district court granted respondents' motion, holding that "a suit for rescission filed more than three years after consummation of an eligible transaction is barred by TILA's statute of repose." *Jesinoski* App. 9a. The district court did not address the contested issue of whether the Jesinoskis received the requisite number

of copies, but noted that their "assertion that they did not receive the required number of disclosures is undermined by documents submitted by Defendants demonstrating that Plaintiffs signed the disclosure documents acknowledging receipt by each Plaintiff of sufficient copies." *Id.* 7a n.3.

*Takushi.* In April 2007, petitioner Rocky Fujio Takushi's parents conveyed to him, individually and as trustee for the Albert G. Takushi Revocable Living Trust, the deed for their primary residence. *Takushi* App. 2a. On September 19, 2007, petitioner's father, through petitioner acting as his father's attorney in fact, entered into a refinance mortgage on that residence with MortgageIT, by executing a promissory note for $230,000. *Takushi* App. 2a. Two days after the loan closing, petitioner (acting as his father's attorney in fact) signed disclosures acknowledging that he "received two (2) completed copies of this Notice of Right to Cancel" as well as the Federal Truth in Lending Disclosure Statement. Opp. to Mot. to Dismiss, Ex. 7, Notice of Right to Cancel, Dkt. 15-7, No. 11-cv-0189, *Takushi* v. *BAC Home Loans Servicing, LP* (D. Haw. Sept. 21, 2007). And that same day, petitioner reconveyed the property to his father; on September 29, 2007, petitioner's father died. *Takushi* App. 23a.

On December 31, 2009, respondent BAC Home Loans Servicing, LP initiated foreclosure proceedings on the property. *Takushi* App. 24a. On May 24, 2010—31 months after the loan closed—petitioner notified respondent of his intent to rescind the mortgage, based on, *inter alia*, BAC's failure to provide him with the required number of copies of the disclosures at closing. Compl., Ex. A, Dkt. 1-2, No. 11-cv-0189, *Takushi* v. *BAC Home Loans Servicing, LP* (D. Haw. May 24, 2010). BAC responded by letters dated June 8 and

June 9, 2010, denying the rescission and enclosing copies of petitioner's signed acknowledgements. Opp. to Mot. to Dismiss, Ex. 7, Dkt. 15-7, No. 11-cv-0189, *Takushi* v. *BAC Home Loans Servicing, LP* (D. Haw. June 8 & 9, 2010). BAC sold the property at a foreclosure sale on July 12, 2010. *Takushi* App. 25a.

Petitioner filed suit on February 9, 2011, seeking rescission of the loan and a declaration regarding the title of the property. The district court dismissed the complaint. Setting aside the question whether petitioner, as a trustee, heir, or successor-in-interest, had standing to sue under TILA—a question as to which the district court recognized there was a split in authority, *see Takushi* App. 9a-15a—the court held that the remedy of rescission was unavailable because the property had already been sold, *id.* 15a (citing 15 U.S.C. § 1635(f)). The court adhered to its ruling on reconsideration, and declined to consider whether petitioner's request for rescission was timely. *Id.* 48a.

### C. Decisions Of The Courts Of Appeals

Petitioners each appealed the district court's judgment.

*Keiran/Sobieniak.* The *Keiran* and *Sobieniak* cases were consolidated for appeal, and the Eighth Circuit affirmed. The court of appeals noted the circuit split and sided with the Ninth and Tenth Circuits, holding that "notice without suit was [not] enough" to toll the three-year repose period for rescission claims; instead, "commencement of suit was required." *Keiran* App. 8a. That rule was mandated, the court explained, not only by TILA, but also by the "general nature of a statute of repose" and "the character of rescission." *Id.* 9a-10a.

As an initial matter, the court found Congress's intent to be clear from the face of the statute: By enacting a strict three-year statute of repose, "Congress intended to foreclose the federal right to rescind provided under TILA, defensively or otherwise, after the three-year period has run." *Keiran* App. 9a; *see also id.* 11a ("the text of the statute ... establishes that filing suit is required"). Enforcing this limitation according to its terms was consistent with "the general nature of a statute of repose as a bar that completely extinguishes the right being claimed after it lapses," and which "serves as an unyielding and absolute barrier to a cause of action that is unconcerned with plaintiff's diligence; instead, a statute of repose is concerned with the defendant's peace." *Id.* 9a (internal quotation marks and alterations omitted).

Further, the court recognized that because "filing suit will certainly be necessary to actually accomplish rescission in most cases where rescission under TILA is sought," *Keiran* App. 11a, merely requiring a borrower to give notice of his intent to rescind would be insufficient to serve the goal of "remedial economy" at the heart of the rescission: "If a plaintiff must only notify the lender of his or her 'intent' to rescind, at some uncertain future date, the plaintiff may or may not take action upon that intent, serving as a cloud on the bank's title if the property proceeded to foreclosure before any action was taken." *Id.* 10a.

The Eighth Circuit disagreed with the CFPB's position—as set forth in an amicus brief—which would require mere notice from a borrower within three years of the loan to effectuate a rescission. The court found that the Bureau's interpretation was not only inconsistent with the text of the statute, but also flawed in failing to provide any guidance as to how rescission is to be effec-

tuated when the lender disputes the borrower's right to rescind. *Keiran* App. 11a. The court rejected the CFPB's position that, in such cases, "the bank, rather than the obligor, should be required to file suit to essentially prevent rescission. This would create a situation wherein rescission is complete, in effect, simply upon notice from the borrower, whether or not the borrower had a valid basis for such remedy." *Id.* 11a.

Judge Murphy dissented from the majority's ruling on the statute of repose.

*Jesinoski.* The Jesinoskis' appeal was heard separately and decided after the court of appeals issued its decision in *Keiran/Sobieniak.* Relying on its prior decision, the court of appeals affirmed the district court's judgment. *Jesinoski* App. 2a. The Eighth Circuit denied rehearing *en banc. Jesinoski* App. 10a. Judge Colloton concurred in the denial of rehearing *en banc*, explaining that, "[n]o matter how this court decides this case, there will remain a well-developed conflict in the circuits on the question how a consumer may exercise his or her right to rescind under [TILA]." *Id.* 11a.

*Takushi.* The Ninth Circuit affirmed the district court's order in *Takushi. Takushi* App. 53a-54a. The court of appeals did not reach the ground on which the district court ruled—that rescission was unavailable because the property had been sold—but instead found the complaint to be untimely, based on its decision in *McOmie-Gray* v. *Bank of America Home Loans*, 667 F.3d 1325 (9th Cir. 2012), which held that TILA's statute of repose "requir[es] dismissal of a claim for rescission brought more than three years after the consummation of the loan secured by the first trust deed, regardless of when the borrower sends notice of rescission," *id.* at 1326. *See Takushi* App. 53a-54a.

## ARGUMENT

### I. THE IRRECONCILABLE SPLIT AMONG THE COURTS OF APPEALS WARRANTS RESOLUTION BY THIS COURT

The courts of appeals are divided as to whether a borrower whose lender disputes his right to rescind his mortgage must file suit within the three-year statute of repose, or need only notify his lender of his intent to rescind. In the decisions on review, the Eighth and Ninth Circuits—consistent with the Tenth Circuit, *see Rosenfield* v. *HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012)—held that such a borrower must file suit before his right to rescind "expire[s]," 15 U.S.C. § 1635(f). In similar circumstances—*i.e.*, where the lender disputed the borrower's attempt to rescind the loan, more than three days after the closing, on the ground that the requisite disclosures were provided at closing—the Third and Fourth Circuits ruled that notice alone within the three-year period prescribed by 15 U.S.C. § 1635(f) sufficed. *See Sherzer* v. *Homestar Mortg. Servs.*, 707 F.3d 255 (3d Cir. 2013); *Gilbert* v. *Residential Funding LLC*, 678 F.3d 271 (4th Cir. 2012).[3]

The split among the courts of appeals on the question presented in this brief—not the broader question presented in the petitions for certiorari—warrants resolution by this Court. The CFPB agrees that the question posed is more narrow than the question presented

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[3] The Sixth Circuit has issued an unpublished decision that is in accord with the Eighth, Ninth, and Tenth Circuits, *see Lumpkin* v. *Deutsche Bank Nat'l Trust Co.*, 534 F. App'x 335 (6th Cir. 2013), but has not ruled on the matter by published opinion. The First and Eleventh Circuits have also opined on this question, albeit on facts that differ from the common scenario presented in the cases that comprise the split just discussed. *See Large* v. *Conseco Fin. Serv. Corp.*, 292 F.3d 49 (1st Cir. 2002); *Williams* v. *Homestake Mortg. Co.*, 968 F.2d 1137 (11th Cir. 1992).

in each of the petitions, focusing specifically on circumstances in which the lender disputes the existence of the right of rescission. *See, e.g.*, CFPB Br. 1, *Sobieniak* v. *BAC Home Loans Servicing, L.P.*, No. 12-1053 (8th Cir. Apr. 17, 2012) ("When a consumer timely exercises an allegedly valid right of rescission by providing notice to the lender within three years, but the lender does not recognize the rescission, must the consumer also file a lawsuit against the lender within three years?").

Among the cases on review, *Jesinoski* most clearly and cleanly presents the pertinent legal issues for this Court's review. The case was decided on a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). There are thus no factual disputes that would obscure or complicate resolution of the question presented. Moreover, the complaint places the question presented in the starkest light: As the Jesinoskis allege, they notified their lender of their intent to rescind their mortgage three years to the day after the closing of the loan, and they filed suit one year and one day later.

## II. THE JUDGMENTS ON REVIEW ARE CORRECT

When a borrower asserts a right to rescind his mortgage loan more than three business days after the closing and the lender disputes the existence of the condition precedent to that right, the majority rule is that a borrower must sue for rescission within the three-year repose period set forth in 15 U.S.C. § 1635(f). That rule is correct. Petitioners' proposed interpretation of TILA indefinitely extends the time for bringing suit, as long as a borrower sends notice to the lender at some point within the three-year repose period. That interpretation is unsupported by the text of TILA, is inconsistent with Congress's intent in enacting the statute of repose, and undermines the poli-

cies underlying both repose periods and rescission rights.

### A. Section 1635(f) Completely Extinguishes The Statutory Right Of Rescission After Three Years

1. As originally enacted in 1968, TILA provided no time limit on the right of rescission outside the three-day "unconditional" period. *See* Consumer Credit Protection Act, Pub. L. No. 90-321, tit. I, § 125, 88 Stat. 153 (1968). That proved problematic for the housing-finance market. As the Federal Reserve Board, among others, expressed to Congress: "[T]itles to many residential real estate properties may become clouded by uncertainty regarding unexpired rights of rescission." Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1972* (Jan. 3, 1973) ("1973 FRB Report"), *reprinted in* 119 Cong. Rec. S2803, S2813 (daily ed. Feb. 20, 1973). In response to those concerns, Congress amended the Act to put a definitive end to that uncertainty. *See* Pub. L. No. 93-495, tit. IV, § 405, 88 Stat. 1517 (1974), *as amended*, Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, tit. VI, § 612(a)(6), 94 Stat. 132.

Choosing uncompromising terms, Congress enacted 15 U.S.C. § 1635(f), which states:

> An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor[.]

This Court found that provision "so straightforward as to render any limitation on the time for seeking a remedy superfluous." *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998). Congress expressed its "manifest intent," *id.* at 419, to "completely extinguish[] the right of rescission at the end of the 3-year period," *id.* at 412. Section 1635(f), this Court concluded, "*takes us beyond any question whether it limits more than the time for bringing suit*, by governing the life of the underlying right as well." *Id.* (emphasis added).

2. As *Beach* makes clear, the "uncompromising provision of § 1635(f)" is not a statute of limitation, but rather a statute of repose. *See* 523 U.S. at 417-419; *Hartman* v. *Smith*, 734 F.3d 752, 759 (8th Cir. 2013) (§ 1635(f) is a statute of repose); *accord Rosenfield* v. *HSBC Bank, USA*, 681 F.3d 1172, 1182 (10th Cir. 2012); *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1326 (9th Cir. 2012); *Sampson* v. *Washington Mut. Bank*, 453 F. App'x 863, 865 n.3 (11th Cir. 2011); *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 301 n.18 (3d Cir. 2010); *Jones* v. *Saxon Mortg., Inc.*, 537 F.3d 320, 326 (4th Cir. 1998).

In choosing a statute of repose over one of limitation, Congress enacted the most effective tool for addressing concerns about the uncertainty that lenders experienced regarding clouds on title and the enforceability of loan agreements, all occasioned by TILA's statutory right of rescission. *See Keiran* App. 10a-11a; *Rosenfield*, 681 F.3d at 1183, 1185; *see also Beach*, 523 U.S. at 418-419 ("Since a statutory right of rescission could cloud a bank's title on foreclosure, Congress may well have chosen to circumscribe that risk[.]").

"Statutes of limitation and statutes of repose are close cousins, but they serve different goals and oper-

ate in slightly different ways." *Augutis* v. *United States*, 732 F.3d 749, 752 (7th Cir. 2013). A statute of limitations "'is a procedural device ... [whose] running simply bars suit.'" *Id.* at 752-753 (alterations in original). In other words, "'[i]t cuts off the remedy.'" *Servicios-Expoarma, C.A.* v. *Industrial Mar. Carriers, Inc.*, 135 F.3d 984, 989 (5th Cir. 1998). A statute of repose, in contrast, "'is substantive. It extinguishes any right to bring any type of cause of action against a party, regardless of whether such action has accrued.'" *Augutis*, 732 F.3d at 753; *accord, e.g.*, *Wong* v. *Beebe*, 732 F.3d 1030, 1048 (9th Cir. 2013) ("statute of repose 'terminates a right of action after a specific time, even if the injury has not yet occurred'"); *McCann* v. *Hy-Vee, Inc.*, 663 F.3d 926 (7th Cir. 2011) (statute of repose "'serves as an unyielding and absolute barrier' to a cause of action"); *Umsted* v. *Umsted*, 446 F.3d 17, 22 n.4 (1st Cir. 2006) ("A statute of repose, contrary to a statute of limitations, terminates an action after a specific period of time not related to the injury or cause of action."). When such a statute "has been enacted, the time for filing suit is engrafted onto a substantive right created by law," and becomes "a substantive part of the plaintiff's cause of action." *Goad* v. *Celotex Corp.*, 831 F.2 508, 511 (4th Cir. 1987).

A period of repose "'is not concerned with the plaintiff's diligence; it is concerned with the defendant's peace.'" *Rosenfield*, 681 F.3d at 1183. A statute of repose is thus a "substantive grant of immunity" representing "an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." *First United Methodist Church of Hyattsville* v. *U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989). In sum, repose represents the clearest

way for a legislature to say, "Done is done." *Jones* v. *Thomas*, 491 U.S. 376, 392 (1989) (Scalia, J., dissenting).

3. Consistent with the plain language and intent of 15 U.S.C. § 1635(f), the majority rule in the circuits is that TILA requires a borrower to file suit within the three-year repose period to enforce a disputed right to rescind. *See Keiran* App. 9a-11a; *Rosenfield*, 681 F.3d at 1183, 1186-1188; *McOmie-Gray*, 667 F.3d at 1329; *see also Lumpkin* v. *Deutsche Bank Nat'l Trust Co.*, 534 F. App'x 335, 338-339 (6th Cir. 2013). As the Tenth Circuit held in *Rosenfield*, "it is the filing of an action in a court ... that is required to invoke the right limited by the TILA statute of repose; the concept of repose itself (especially in the context here) fundamentally *limits* the ability to file an action." 681 F.3d at 1183.

Petitioners do not dispute that 15 U.S.C. § 1635(f) is a statute of repose (nor could they), but one petition argues that this fact does not necessarily mean the statute governs the time for bringing suit. *See Keiran* Pet. 18. As the argument goes, "'Congress may choose to use a statute of repose to make the filing of a lawsuit necessary in order to exercise a statutory right, but when it has chosen to do so, it has done so explicitly.'" *Id.* This argument misses the mark. Congress here used the clearest language possible—making any reference to an action itself superfluous. As the Court concluded in *Beach*: "To be sure, a limitation provision may be held to be nothing more than a bar to bringing suit[.] ... *Section 1635(f), however, takes us beyond any question whether it limits more than the time for bringing suit*, by governing the life of the underlying right as well." 523 U.S. at 418 (emphasis added).

### B. In A Case In Which The Condition Precedent To The Existence Of The Rescission Right Is Disputed, TILA Requires That A Borrower Bring Suit During The Repose Period To Rescind The Loan

1. In order to rescind their mortgage loans in these contested cases, petitioners were required to prove that the lender failed to comply with its disclosure obligations under the Act. *See Thompson* v. *Irwin Home Equity Corp.*, 300 F.3d 88, 89 (1st Cir. 2002); *Large* v. *Conseco Fin. Servicing Corp.*, 292 F.3d 49, 52 (1st Cir. 2002); *cf. Balderas* v. *Countrywide Bank, N.A.*, 664 F.3d 787, 791 (9th Cir. 2011) ("if [borrowers] can prove" a TILA violation, then "the bank will have forfeited the benefit of the three-day cooling off period and the [borrowers] would have three years to rescind"). Absent that failure, any rescission right expired three days following each transaction.

Petitioners ignore the critical distinction between rescission within three business days of closing—which is unconditional—and rescission outside that period—which is expressly conditioned on the existence of a TILA disclosure violation. *See Yamamoto* v. *Bank of New York*, 329 F.3d 1167, 1172 (9th Cir. 2003) (automatic rescission "makes no sense when ... the lender contests the ground upon which the borrower rescinds"); *see id.* ("it cannot be that the security interest vanishes immediately upon the giving of notice"). In a case outside the unconditional period where the lender contests the borrower's right to rescind, a borrower's notice "does not actually rescind the transaction but merely communicates the obligor's '*intention* to [rescind the transaction]." *Hartman*, 734 F.3d at 760 n.2 (quoting 15 U.S.C. § 1635(a)) (emphasis and alteration in original). A consumer "'rescinds' the transaction" only when "the

right to rescind is determined in the borrower's favor." *Yamamoto*, 329 F.3d at 1172; *American Mortg. Network, Inc.* v. *Shelton*, 486 F.3d 815, 821 (4th Cir. 2007) ("This Court adopts the majority view of the reviewing courts that unilateral notification of cancellation does not automatically void the loan contract."); *Large*, 292 F.3d at 55 ("If a lender disputes a borrower's purported right to rescind, the designated decision maker ... must decide whether the conditions for rescission have been met."); *see also* Rohner & Miller, *Truth in Lending* 319 (Harrell ed., 2007 Supp.) ("[C]onsiderable case law indicates that the creditor upon receiving a notice of rescission, is not required to immediately cancel its security interest and effectively become an unsecured creditor before it has an opportunity to be heard before a court."). "Until such decision is made," a borrower has "only advanced a claim seeking rescission." *Large*, 292 F.3d at 55.

2. Congress understood that borrowers and lenders could, and likely would, dispute the validity of a rescission claimed outside the initial three-day unconditional period. The problem with a later rescission notice, one senator observed, "is simply that a creditor has no way of knowing, upon receipt of a subsequent notice of rescission after the three-day right to rescission has expired, whether ... the borrower has the right to rescind such a credit transaction." 123 Cong Rec. S7846, S7849 (daily ed. May 12, 1977) (statement of Sen. Garn). In the case of a dispute, any claim for rescission is only that—a claim—as to which questions of fact and law arise: Did the borrower receive the required disclosures? Did she sign for them? Were the disclosures legally sufficient under TILA?

These are questions that require judicial resolution, for which TILA expressly provides. The statute rec-

ognizes the availability of an "action in which it is determined that a creditor has violated" § 1635, 15 U.S.C. § 1635(g), and an "action in which a person is determined to have a right of rescission under section 1635," *id.* § 1640(a)(3). TILA also provides for a "rebuttable presumption" that a borrower who signs an acknowledgement of receipt in fact received the required disclosures. *Id.* § 1635(c). The purpose of such a presumption, of course, is to have effect in litigation, imposing on the party against whom it is directed—here, the borrower—"the burden of producing evidence to rebut the presumption." Fed. R. Evid. 301. And TILA further provides that the rescission process set out in § 1635 will "apply except when otherwise ordered by a court." 15 U.S.C. § 1635(b).

Contrary to what petitioners suggest (*see Keiran* Pet. 13-14), litigation is an express and necessary part of a contested rescission. The CFPB, and previously the Federal Reserve Board, have acknowledged as much. *See* 12 C.F.R. pt. 226, Supp. I, cmt. § 226.23—Right of Rescission ¶ 23(d)(4) ("Where a consumer's right to rescind is contested by the creditor, a court would normally determine whether the consumer has a right to rescind[.]"); 75 Fed. Reg. 58,539, 58,547 (proposed Sept. 24, 2010) ("If the consumer provides a notice of rescission after the initial three-business-day period ... , the process is problematic. In this case, it may be unclear whether the consumer's right to rescind has expired."); *id.* at 58,629 ("[W]hen a creditor receives a consumer's notice after the initial-three-day period, the rescission process is unclear and courts are frequently called upon to resolve rescission claims."). And, as TILA makes clear, unless a borrower brings suit to effect rescission within the three-year period of repose—so as to have a court "determine[]" whether "a creditor

has violated" § 1635, *see* 15 U.S.C. § 1635(g); *see id.* § 1640(a)(3)—the right of rescission completely expires, *id.* § 1635(f).

### C. Petitioners' Interpretation Of TILA Is Flawed

1. Petitioners ask this Court to "restore certainty to the housing market." *Keiran* Pet. 1. Yet petitioners' interpretation of TILA would do precisely the opposite, sowing uncertainty where Congress intended repose. Indeed, petitioners' interpretation, if adopted, would effectively amend TILA to its pre-1974 state in which there was no limit on the length of time that a borrower could bring an action seeking to enforce a contested right of rescission.

The petitions here illustrate the problem: The Keirans, for example, filed their suit for rescission nearly four years after the closing of the consummation of their loan. *See Keiran* Pet. 5-6. The Jesinoskis filed their suit four years and one day after their loan closed. *See Jesinoski* Pet. 6-7. And nothing under petitioners' reading of TILA would prevent borrowers from waiting even longer: On their view, a borrower need only notify the lender of his intent to rescind the mortgage—regardless of how frivolous the claimed TILA violation is—with no limitation on when he must sue. Notably, none of the petitioners proposes any time limit on when a borrower must file suit for rescission under TILA.

The only limit even mentioned as a possibility in any of the petitions is a one-year time limit drawn from 15 U.S.C. § 1640(e). *See Keiran* Pet. 19 (noting that CFPB has "observe[d] that 'some courts have concluded that'" the one-year statute of limitation from 15

U.S.C. § 1640 applies).[4] The lack of any endorsement from petitioners (or even the CFPB) is telling. In any event, that one-year statute of limitations applies to claims for damages—not claims for rescission. *See McOmie-Gray*, 667 F.3d at 1329 ("[A]dopting § 1640's one-year statute of limitations to rescission actions contradicts the plain language of the statute."). Indeed, this Court previously recognized the "stark contrast" between the "1-year limitation provision on damages actions" in § 1640(e) and the "treatment of rescission" in the "uncompromising provision of § 1635(f)." *Beach*, 523 U.S. at 418. Thus, as petitioners would have it, the same Congress that carefully provided a statute of limitations for damages actions and a statute of repose for rescission nevertheless provided no time limit for the judicial enforcement of a contested rescission right. That is plainly inconsistent with Congress's intent: To have a statute of repose in this context that speaks only to notice—leaving litigation wholly unaddressed—would "run counter to the commercial-certainty concerns of Congress (recognized in *Beach*) that led Congress to establish the fixed and limited repose period of § 1635(f) in the first place." *Rosenfield*, 681 F.3d at 1187.

2. Petitioners' interpretation is also inequitable and inconsistent "with the general goal and application of a rescission remedy." *Rosenfield*, 681 F.3d at 1185. "Rescission in its most basic form is an equitable remedy designed to return the parties to the status quo prevailing before the existence of an underlying contract." *Id.* at 1183; *see Keiran* App. 10a. "It confers upon a

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[4] Since the Jesinoskis filed their suit one year and one day after sending their notice, any time limit for bringing suit they might support would presumably extend longer than one year.

party the right to void a contract in equity—*i.e.*, to make it such that 'the agreement [had] never been executed.'" *Rosenfield*, 681 F.3d at 1184 (alteration in original). "[T]he primary justification of rescission" is that of "'remedial economy,' not ... the compensatory goal of a damages award." *Id.*; *see Andrews* v. *Chevy Chase Bank*, 545 F.3d 570, 575 (7th Cir. 2008) (rescission under TILA is "restorative rather than compensatory"). "Consequently, it is not an appropriate remedy in circumstances where its application would lead to prohibitively difficult (or impossible) enforcement." *Rosenfield*, 681 F.3d at 1184; *see Keiran* App. 10a.

Under petitioners' approach, a borrower's notice within three years is all that is required to rescind a transaction; a lawsuit can come anytime thereafter. Under that view, "in a significant number of instances, the remedial economy of the remedy would be jeopardized." *Rosenfield*, 681 F.3d at 1185; *see Hartman*, 734 F.3d at 759. Unraveling a mortgage transaction three years after the fact is difficult enough; extending that period indefinitely on the mere sending of notice indicating the borrower's "intent" to rescind, would be, to say the least, "costly and difficult," given that "the underlying circumstances in no small number of cases are likely to have changed significantly." *Rosenfield*, 681 F.3d at 1185; *see Hartman*, 734 F.3d at 759.

3. Petitioners say that requiring borrowers to file suit within three years would "'incentivize consumers to file suit immediately, rather than working privately with their lenders to unwind the transaction,' thereby creating unnecessary litigation." *Keiran* Pet. 15. That is wrong. Under the majority rule, there is no incentive for consumers to file suit "'immediately,'" *id.*; all that is required of a borrower is that he file suit, if at all, within the "generous three-year period of repose,"

*Rosenfield*, 683 F.3d at 1185 n.9—which provides more than sufficient time for the borrower and his lender to negotiate.

It is petitioners' interpretation of TILA that would bring about unnecessary, avoidable litigation. If, as petitioners would have it, a borrower need only notify his lender of his intent to rescind, then the lender's claim to title becomes fraught with uncertainty: Now that the borrower has put down the requisite placeholder, will he or will he not ever actually sue for rescission? *See Keiran* App. 10a. Unless the lender is willing to operate with a perpetual "cloud on [its] title," *id.*—in the form of some possible lawsuit at some point in the future—the lender's only option is to file a declaratory-judgment suit immediately upon receiving a rescission notice, even if that notice is facially meritless, *cf. id.* 11a (rejecting argument that "the bank, rather than the obligor, should be required to file suit to essentially prevent rescission").

### D. The CFPB's View Deserves No Deference

Petitioners contend that the decisions on review "depart[] from settled principles of agency deference," *Keiran* Pet. 15, because they purportedly failed to accord deference to Regulation Z and the CFPB's interpretation of TILA as set forth in its amicus briefs below, *see id.* 15-17; *Jesinoski* Pet. 23-24. This argument misses the mark; the CFPB's view deserves no deference.

First, TILA's plain text, as reflected in the majority rule, is clear and "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Negusie* v. *Holder*, 555 U.S. 511, 542 (2009) (internal quotation marks omitted).

Second, even if there were ambiguity in the Act (and there is not), no deference would be due to Regulation Z for a number of reasons, including because the regulation provides no clarity on the statutory interpretation issues here. The regulation refers generally to a consumer's "right to rescind the transaction," without reference to or discussion of the two periods during which rescission may be sought. 12 C.F.R. § 1026.23(a)(1). As this Court explained in *Gonzales* v. *Oregon*,

> Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.

546 U.S. 243, 257 (2006).

To the extent that the CFPB has purported to interpret TILA itself—or the Bureau's own "parroting regulation"—in its amicus briefs below, its interpretation should be rejected. The CFPB's view of the statute and its own regulation, like that of petitioners, fundamentally disregards Congress's intent, vitiating the certainty of title that it sought to ensure through its enactment of § 1635(f). *Cf. Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (deference to agency interpretation of its own regulation, advanced in a legal brief, is unwarranted if that interpretation is "plainly erroneous").

## CONCLUSION

The Court should grant certiorari to resolve the irreconcilable split among the courts of appeals and should affirm the majority rule, as reflected in the decisions below.

Respectfully submitted.

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MARCH 2014

# REPLY BRIEF

APR 18 PAGE 16
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No. 13-684

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

LARRY D. JESINOSKI AND CHERYLE JESINOSKI,
INDIVIDUALS,
*Petitioners*,

v.

COUNTRYWIDE HOME LOANS, INC.,
SUBSIDIARY OF BANK OF AMERICA N.A.,
D/B/A AMERICA'S WHOLESALE LENDER, ET AL.,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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April 2, 2014

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## ARGUMENT

**1. Petitioners and respondents agree that the decision below warrants this Court's review.** There is a "well-developed, irreconcilable split among the courts of appeals" that "only this Court can resolve" regarding whether notice to the creditor is sufficient to exercise the right to rescind a home loan under Section 1635 of the Truth in Lending Act. Resp. Br. 3. In addition to the decisions in the Eighth and Ninth Circuits on review, six other courts of appeals have divided on the issue. *See* Pet. 9-18 (discussing *Large v. Conseco Fin. Serv. Corp.*, 292 F.3d 49 (1st Cir. 2002); *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255 (3d Cir. 2013); *Gilbert v. Residential Funding LLC*, 678 F.3d 271 (4th Cir. 2012); *Lumpkin v. Deutsche Bank Nat'l Trust Co.*, 534 F. App'x 335 (6th Cir. 2013); *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012); *Williams v. Homestake Mortg. Co.*, 968 F.2d 1137 (11th Cir. 1992)). There is thus no dispute that this Court's intervention is necessary to resolve a deep circuit conflict on a legal issue of pressing national importance.

Respondents agree that *Jesinoski* "most clearly and cleanly presents the legal issues for this Court's review." Resp. Br. 19. As respondents explain, "[t]he case was decided on a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c)" and "thus no factual disputes . . . would obscure or complicate resolution of the question presented." *Id.* The court of appeals in turn decided the case solely on the ground "that a party seeking to rescind a loan transaction must file suit within three years of consummating the loan." *Jesinoski* App. 2a.[1] Because

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[1] References to "*Jesinoski* App." are to the appendix filed in No. 13-684; references to "*Keiran* App." are to the appendix filed

*Jesinoski* is an ideal vehicle for this Court's review, therefore, the *Jesinoski* petition should be granted.

**2. Respondents mistakenly argue that the judgment below is correct on the merits.** Although a full explication of the merits arguments is not called for at this stage of the proceeding, it bears noting that respondents' merits arguments misconceive the statutory right to rescind and thereby mischaracterize the issue before the Court.[2]

Indeed, respondents' merits arguments essentially ignore the text of the statutory provision that creates the right to rescind. Section 1635(a) provides that a borrower "shall have the right to rescind the transaction until midnight of the third day following . . . the delivery of the information and rescission forms required under this section . . . by notifying the creditor . . . of his intention to do so." 15 U.S.C. § 1635(a). Section 1635(f), on which respondents exclusively focus, then provides that this "right of rescission shall expire three years after the date of consummation of the transaction." *Id.* § 1635(f). The question is not, as respondents suggest, whether a borrower may exercise the right to rescind by filing suit after the three-year period specified in Section 1635(f) because notice "indefinitely toll[s] [the Act's] statute of repose until such time as the borrower sees fit to file suit." Resp. Br. 3. Rather, the question is whether, in accordance with Section 1635(a)'s clear text, a borrower

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in No. 13-705; references to "*Takushi* App." are to the appendix filed in No. 13-884.

[2] Additionally, respondents erroneously assert that "the Jesinoskis' home was in foreclosure." Resp. Br. 13. However, there is no record of any foreclosure proceeding commenced by respondents since the mortgage loan's origination on February 23, 2007.

has *already* exercised the right to rescind "by notifying the creditor" within the three-year limitations period of Section 1635(f). *See* Pet. 1-2.

3. **Respondents err in attempting to narrow the question presented.** *See* Resp. Br. 2-3, 18-19. The courts of appeals that have considered the meaning of Section 1635 have analyzed the issue as presented in the petition. *See, e.g.*, *Jesinoski* App. 2a ("The sole issue on appeal is whether mailing a notice of rescission within three years of consummating a loan is sufficient to 'exercise' the right to rescind a loan transaction pursuant to 15 U.S.C. § 1635(a) or, alternatively, whether a party seeking to rescind the transaction is required to file a lawsuit within the three-year statutory period."); *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1328 (9th Cir. 2012) ("under the case law of this court and the Supreme Court, rescission suits must be brought within three years from the consummation of the loan, regardless whether notice of rescission is delivered within that three-year period."). Moreover, the statutory text makes no distinction between situations in which the "creditor disputes the existence of the condition precedent," Resp. Br. 2-3, and those in which it does not. *See* 15 U.S.C. § 1635(a), (f). Respondents' formulation of the question presented thus artificially rewrites the statutory text and would impede its proper interpretation.

4. **The Court should grant the petition in *Jesinoski* and hold the petitions in *Keiran* and *Takushi* pending resolution of this case.** As respondents acknowledge, the *Jesinoski* case is the superior vehicle among the pending petitions for this Court to resolve the circuit conflict. Resp. Br. 19. By contrast, both *Keiran* and *Takushi* are less advanta-

geous petitions for resolving the question presented. In both cases consolidated in the *Keiran* petition, the district court made factual findings on the merits of the plaintiffs' claims under the Act. *See Keiran* App. 43a ("Bank of New York claims that no violations of the [Act] were evident on the face of the Keirans' loan documents. The court agrees.") (*Keiran*), 53a ("plaintiffs offer no evidence that their signatures on the cancellation notices and TILA disclosure do not mean what they say," and "a bald assertion . . . years later" to the contrary "is not sufficient to overcome the presumption" that they received the required disclosures) (*Sobieniak*). By contrast, the district court in *Jesinoski* explicitly stated that, "for purposes of the present motion, the Court assumes without deciding that [the Jesinoskis] have pled a plausible claim that they did not receive the required documents at closing." *Jesinoski* App. 7a n.3.

Although the petitions squarely present only the issue whether borrowers effectively exercise their right to rescind by providing written notice within three years of the consummation of the loan, petitioners in the consolidated *Kieran* petition suggest that a "subsidiary issue" involving the statute of limitations for enforcing the right to rescind may warrant the Court's attention. *See Kieran* Pet. 18-19. However, the Court need not, and should not, reach a "subsidiary issue" not clearly presented in the petitions or ruled on below. Moreover, the plaintiffs in the two cases consolidated in the *Keiran* petition are differently situated with respect to that "subsidiary issue" because only one filed suit within the one-year time frame that has been suggested as an appropriate statute of limitations. *See id.* at 19; *compare Keiran* App. 3a ("On January 15, 2010, the Sobieniaks sent a

notice of rescission .... On January 14, 2011, the Sobieniaks filed the present action ....") *with id.* at 4a ("On October 8, 2009, the Keirans sent rescission notices .... On October 29, 2010, the Keirans filed the current action ...."). As a result, briefing and advocacy for the *Keiran* petitioners may be complicated by the fact that one but not the other petitioner in that case would prevail under a one-year time limit for filing suit.

The petition in *Takushi* suffers from numerous factual and legal complications that render it less appropriate for this Court's review. *First*, the district court assumed without deciding that Takushi had standing. *See Takushi* App. A15 ("[t]he Court declines to decide the issue of Plaintiff's standing in the instant case because, even assuming, *arguendo*, that Plaintiff has standing as a trustee, heir, or successor-in-interest to bring his TILA claim, rescission is unavailable"). *Second*, the district court dismissed Takushi's suit solely on the independently sufficient ground that the sale of the property terminated the right to rescind under Section 1635(f) and explicitly declined to address the question presented. *See id.* at A48 ("The Court declines to consider the parties' arguments with respect to [the effect of a notice of rescission on the three-year TILA limitations period] because [that issue] does not affect this Court's finding that the sale of the Property terminated Plaintiff's right of rescission."). *Third*, the district court's decision on the effect of the sale of the property is deeply intertwined with issues of state law. *See id.* at A43 (holding that state law "bar[red] [Takushi] from now challenging the foreclosure sale").

Accordingly, the Court should follow its usual practice and grant the petition here while holding "the

certiorari papers [in *Keiran* and *Takushi*] . . . pending [the Court's] plenary ruling" in *Jesinoski*. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 346 (10th ed. 2013).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 2, 2014

# JOINT APPENDIX

RECORD
AND
BRIEFS

No. 13-684

Supreme Court, U.S.
FILED
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IN THE
# Supreme Court of the United States

LARRY D. JESINOSKI AND CHERYLE JESINOSKI,
INDIVIDUALS,
*Petitioners,*

v.

COUNTRYWIDE HOME LOANS, INC.,
SUBSIDIARY OF BANK OF AMERICA, N.A.,
D/B/A AMERICA'S WHOLESALE LENDER, ET AL.,
*Respondents.*

**On Writ of Certiorari**
**to the United States Court of Appeals**
**for the Eighth Circuit**

## JOINT APPENDIX

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July 15, 2014

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**PETITION FOR A WRIT OF CERTIORARI FILED: DEC. 6, 2013**
**CERTIORARI GRANTED: APR. 28, 2014**

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix but may be found in the appendix to the petition for a writ of certiorari in this case:

Opinion of the United States Court of Appeals for the Eighth Circuit, *Jesinoski, et al. v. Countrywide Home Loans, Inc., etc., et al.*, No. 12-2202 (Sept. 10, 2013) ..... 1a

Memorandum Opinion and Order of the United States District Court for the District of Minnesota, *Jesinoski, et al. v. Countrywide Home Loans, Inc., etc., et al.*, Civil No. 11-474 (DWF/FLN) (Apr. 19, 2012) ..... 4a

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12 C.F.R. § 226.23(a)-(b) (Regulation Z of the Federal Reserve Board) ..... 17a

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

---

Civil No. 11-474 (DWF/FLN)

LARRY D. JESINOSKI AND CHERYLE JESINOSKI, INDIVIDUALS,
*Plaintiffs*,

v.

COUNTRYWIDE HOME LOANS, INC., D/B/A AMERICA'S WHOLESALE LENDER, SUBSIDIARY OF BANK OF AMERICA N.A., ET AL.,
*Defendants*.

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CIVIL DOCKET

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| Date Filed | # | Docket Text |
|---|---|---|
| 2/24/11 | 1 | COMPLAINT against BAC Home Loans Servicing, LP, Countrywide Home Loans, Inc., John & Jane Does 1-10, Mortgage Electronic Registration Systems, Inc. (Filing fee $350 receipt number 4052510.) assigned to Judge Donovan W Frank per Master list referred to Magistrate Judge Franklin L. Noel, filed by Larry D. Jesinoski, Cheryle Jesinoski. (Attachments: #1 Civil Cover Sheet) (LPH) DOCUMENTS QC'd by KT on 3/10/11. (KT) (Entered: 02/25/2011) |

* * *

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|---|---|---|
| 7/22/11 | 7 | AMENDED COMPLAINT against BAC Home Loans Servicing, LP, Countrywide Home Loans, Inc., John & Jane Does 1-10, Mortgage Electronic Registration Systems, Inc., filed by Larry D. Jesinoski, Cheryle Jesinoski. (Attachments: #1 Exhibit(s) TIL disclosure statement, #2 Exhibit(s) 2 copies of Notice of Right to Cancel) (Keogh, Michael) (Entered: 7/22/2011) |
| 8/22/11 | 8 | ANSWER to Amended Complaint by BAC Home Loans Servicing, LP, Countrywide Home Loans, Inc., Mortgage Electronic Registration Systems, Inc. (Hanson, Andre) (Entered: 08/22/2011) |

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|---|---|---|
| 10/28/11 | 13 | MOTION for Judgment on the Pleadings by BAC Home Loans Servicing, LP, Mortgage Electronic Registration Systems, Inc. (Hanson, Andre) (Entered: 10/28/2011) |

* * *

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|---|---|---|
| 10/28/11 | 15 | MEMORANDUM in Support re 13 MOTION for Judgment on the Pleadings filed by BAC Home Loans Servicing, LP, Mortgage Electronic Registration Systems, Inc. (Attachments: #1 LR7.1 Word Count Compliance Certificate) (Hanson, Andre) (Entered: 10/28/2011) |
| 10/28/11 | 16 | Declaration of Andre Hanson in Support of 15 Memorandum in Support of Motion, filed by BAC Home Loans |

Servicing, LP, Mortgage Electronic Registration Systems, Inc. (Attachments: #1 Exhibit(s) A and B) (Hanson, Andre) (Entered: 10/28/2011)

* * *

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|---|---|---|
| 1/27/12 | 20 | MEMORANDUM in Opposition re 13 MOTION for Judgment on the Pleadings filed by Cheryle Jesinoski, Larry D. Jesinoski. (Attachments: #1 LR7.1 Word Count Compliance Certificate) (Keogh, Michael) (Entered: 1/27/2012) |
| 2/3/12 | 21 | REPLY Memorandum re 13 MOTION for Judgment on the Pleadings filed by BAC Home Loans Servicing, LP, Countrywide Home Loans, Inc., Mortgage Electronic Registration Systems, Inc. (Attachments: #1 LR7.1 Word Count Compliance Certificate). (Hanson, Andre) Modified text on 2/6/2012 (MMP). (Entered: 02/03/2012) |
| 2/17/12 | 22 | Minute Entry for proceedings held before Judge Donovan W. Frank: Motion Hearing held on 2/17/2012 re 13 MOTION for Judgment on the Pleadings filed by Mortgage Electronic Registration Systems, Inc., BAC Home Loans Servicing, LP. Matter taken under advisement; written order to issue. (Court Reporter Jeanne Anderson) (BJS) (Entered: 02/20/2012) |
| 4/19/12 | 23 | MEMORANDUM OPINION AND ORDER. Defendants' Motion for Judgment on the Pleadings (Doc. No. 13) is GRANTED. (Written Opinion). |

| | | |
|---|---|---|
| | | Signed by Judge Donovan W. Frank on 4/19/2012. (BJS) (Entered: 4/19/2012) |
| 4/19/12 | 24 | JUDGMENT (Attachments: #1 Civil-8th Circuit Pre-Hearing Conference Notice, #2 Civil Notice – appeal) (MMP) (Entered: 04/19/2012) |
| 5/18/12 | 25 | NOTICE OF APPEAL TO 8TH CIRCUIT as to 23 Order on Motion for Judgment on the Pleadings, 24 Judgment by Cheryle Jesinoski, Larry D. Jesinoski. Filing fee $455, receipt number 0864-3187469. (Attachments: #1 COA – Form A, #2 COA – Form B) (Kéogh, Michael) (Entered: 5/18/2012) |
| 5/21/12 | 26 | TRANSMITTAL OF APPEAL LETTER TO U. S. COURT OF APPEALS, 8TH CIRCUIT, Re: Notice of Appeal to 8th Circuit, 25. (MMP) (Entered: 05/21/2012) |
| 5/21/12 | 27 | USCA Case Number 12-2202 for 25 Notice of Appeal to 8th Circuit, filed by Larry D. Jesinoski, Cheryle Jesinoski. (jam) (Entered: 05/22/2012) |

* * *

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|---|---|---|
| 7/31/12 | 30 | TRANSMITTAL OF APPEAL LETTER TO U. S. COURT OF APPEALS, 8TH CIRCUIT, Re: Notice of Appeal to 8th Circuit, 25. Transcript 29 sent to USCA. (jam) (Entered: 07/31/2012) |
| 9/10/13 | 31 | Opinion of USCA as to 25 Notice of Appeal to 8th Circuit (Judge Loken, Judge Melloy, Colloton): Accordingly, we affirm the district court's judgment on the pleadings in favor of the lenders. |

(Attachments: #1 Cover Letter) (akl) (Entered: 09/10/2013)

9/10/13 32 USCA JUDGMENT as to 25 Notice of Appeal to 8th Circuit: After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court. (received electronically from COA) (akl) (Entered: 09/10/2013)

11/20/13 33 MANDATE of USCA as to 25 Notice of Appeal to 8th Circuit, filed by Larry D. Jesinoski, Cheryle Jesinoski (received electronically from COA) (akl) (Entered: 11/21/2013)

* * *

12/12/13 35 NOTICE from the Supreme Court of the United States: The petition for a writ of certiorari in the above entitled case was filed on December 6, 2013 and placed on the docket December 6, 2013 as No. 13-684. (Attachments: #1 Cover Letter) (akl) (Entered: 12/13/2013)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

---

No. 12-2202

LARRY D. JESINOSKI AND CHERYLE JESINOSKI, INDIVIDUALS,
*Plaintiffs-Appellants,*

v.

COUNTRYWIDE HOME LOANS, INC., SUBSIDIARY OF BANK OF AMERICA N.A., DOING BUSINESS AS AMERICA'S WHOLESALE LENDER, ET AL.,
*Defendants-Appellees.*

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| Date Filed | Docket Text |
|---|---|
| 5/21/12 | Civil case docketed. [3913804] [12-2202] (CBC) |
| | * * * |
| 7/11/12 | ADDENDUM of APPELLANT FILED by Appellants Ms. Cheryle Jesinoski and Mr. Larry D. Jesinoski. w/service 07/10/2012 [3930618] [12-2202] (YML) |
| | * * * |
| 7/11/12 | RECORD FILED – APLNT/PET APPENDIX, 1 volumes, Location STL, Comments: 3 Copies [3930686] [12-2202] (YML) |
| | * * * |
| 7/12/12 | BRIEF FILED – APPELLANT BRIEF filed by Ms. Cheryle Jesinoski and Mr. Larry |

D. Jesinoski. w/service 07/11/2012, Length: 6,581 words 10 COPIES OF PAPER BRIEFS FROM Cheryle Jesinoski and Larry D. Jesinoski due 07/17/2012 WITH revised certificate of service for paper briefs. Brief of BAC Home Loans Servicing, LP, Countrywide Home Loans, Inc., John and Jane Does 1-10 and Mortgage Electronic Registration Systems, Inc. due on 8/13/2012. [3931332] [12-2202]--[Edited 07/13/2012 by YML] (YML)

* * *

8/2/12 RECORD FILED – MOTION TRANSCRIPT, 1 volumes, Location STP, Source Location: DC, Dt. Of Proceeding/Hearing: 02/17/2012, No. of Pgs.: 57, Court Reporter: Anderson, Jeanne Marie [3938694] [12-2202] (CYZ)

* * *

8/14/12 BRIEF FILED – APPELLEE BRIEF filed by BAC Home Loans Servicing, LP, Countrywide Home Loans, Inc. and Mortgage Electronic Registration Systems, Inc., w/service 08/13/2012 , Length: 8,865 words 10 COPIES OF PAPER BRIEFS FROM BAC Home Loans Servicing, LP, Countrywide Home Loans, Inc. and Mortgage Electronic Registration Systems, Inc. due 08/20/2012 WITH revised certificate of service for paper briefs. Reply brief of Cheryle Jesinoski and Larry D. Jesinoski due on 08/28/2012. [3942333] [12-2202] (YML)

8/14/12 RECORD FILED – APLEE/RES APPENDIX, 1 volumes, Location STL, Comments: 3 Copies [3943326] [12-2202] (YML)

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8/29/12 BRIEF FILED – APPELLANT REPLY BRIEF filed by Ms. Cheryle Jesinoski and Mr. Larry D. Jesinoski. w/service 8/28/2012, Length: 3,428 words 10 COPIES OF PAPER BRIEFS FROM Cheryle Jesinoski and Larry D. Jesinoski due 09/04/2012 WITH revised certificate of service for paper briefs. [3947915] [12-2202] (YML)

* * *

12/11/12 ARGUED & SUBMITTED in St. Paul to Judges James B. Loken, Michael J. Melloy, Steven M. Colloton on 12/11/2012. Mr. Michael J. Keogh for Appellants Mr. Larry D. Jesinoski and Ms. Cheryle Jesinoski and Mr. Sparrowleaf Dilts McGregor for Appellees BAC Home Loans Servicing, LP, Mortgage Electronic Registration Systems, Inc. and Countrywide Home Loans, Inc. No Rebuttal. --RECORDED-- [3983486] [12-2202] (DMW)

* * *

2/7/13 28(j) citation filed by Appellees BAC Home Loans Servicing, LP and Countrywide Home Loans, Inc. w/service 02/07/2013 – FOR CAL. [4002626] [12-2202] (ATH)

2/8/13 Response of Appellants Ms. Cheryle Jesinoski and Mr. Larry D. Jesinoski to 28(j) citation, [4002626-2], filed by BAC Home Loans Servicing, LP and Country-

wide Home Loans, Inc. in 12-2202, 28(j) citation for Calendar, [4002626-3], filed by BAC Home Loans Servicing, LP and Countrywide Home Loans, Inc. in 12-2202. w/service 02/08/2013 – FOR CAL. [4003212] [12-2202] (MJK)

* * *

7/15/13 28(j) citation filed by Appellees BAC Home Loans Servicing, LP, Countrywide Home Loans, Inc. and Mortgage Electronic Registration Systems, Inc. w/service 07/15/2013 – FOR CAL. [4054933] [12-2202] (ATH)

7/16/13 Response of Appellants Ms. Cheryle Jesinoski and Mr. Larry D. Jesinoski to 28(j) citation, [4054933-2], filed by BAC Home Loans Servicing, LP, Mortgage Electronic Registration Systems, Inc. and Countrywide Home Loans, Inc. in 12-2202, 28(j) citation for Calendar, [4054933-3], filed by BAC Home Loans Servicing, LP, Mortgage Electronic Registration Systems, Inc. and Countrywide Home Loans, Inc. in 12-2202. w/service 07/16/2013 – FOR CAL. [4055584] [12-2202] (MJK)

9/10/13 PER CURIAM OPINION FILED – THE COURT: James B. Loken, Michael J. Melloy and Steven M. Colloton (PUBLISHED), CONCUR BY: Michael J. Melloy, concurring in the judgment and Steven M. Colloton, concurring. [4073747] [12-2202] (YML)

9/10/13 JUDGMENT FILED – The judgment of the Originating Court is AFFIRMED in accordance with the opinion. JAMES B.

LOKEN, MICHAEL J. MELLOY and STEVEN M. COLLOTON Hrg Dec 2012 [4073752] [12-2202] (YML)

9/24/13 PETITION for enbanc rehearing and also for rehearing by panel filed by Appellants Ms. Cheryle Jesinoski and Mr. Larry D. Jesinoski w/service 09/24/2013 [4079103] [12-2202] (MJK)

10/10/13 JUDGE ORDER: A petition for rehearing en banc has been filed by the Appellants' in the above case. The court requests a response to the petition for rehearing en banc. The response is limited to fifteen pages and should be filed electronically. Response due on 10/21/2013 by Appellees BAC Home Loans Servicing, LP and Countrywide Home Loans, Inc. Hrg Dec 2012 [4084493] [12-2202] (YML)

10/21/13 RESPONSE in opposition to petition for en banc rehearing [4079103-2], petition for rehearing by panel [4079103-3] filed by Attorney Mr. Andre Timothy McCoy Hanson for Appellees BAC Home Loans Servicing, LP, Mortgage Electronic Registration Systems, Inc. and Countrywide Home Loans, Inc., w/service 10/21/2013. [4087863] [12-2202] (ATH)

11/13/13 JUDGE ORDER: The petition for rehearing en banc is denied. The petition for panel rehearing is also denied. Judges Murphy, Bye, Smith and Kelly would grant the petition for rehearing en banc. Judge Gruender did not participate in the consideration or decision of this matter. Judge Colloton is concurring in denial of rehearing en banc.

See order for complete text. [4079103-2] [4079103-3] PUBLISHED ORDER. Hrg Dec 2012 [4095800] [12-2202] (YML)

11/20/13 MANDATE ISSUED. [4098183] [12-2202] (YML)

* * *

12/6/13 U.S. Supreme Court Notice of cert filed in the Supreme Court on 12/06/2013, case No. 13-684 [4104991] [12-2202] (SRD)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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Court File No. 11-CV-474 (DWF/FLN)

LARRY D. JESINOSKI AND CHERYLE JESINOSKI, INDIVIDUALS,
*Plaintiffs*,

v.

COUNTRYWIDE HOME LOANS, INC., D/B/A AMERICA'S WHOLESALE LENDER, SUBSIDIARY OF BANK OF AMERICA N.A., ET AL.,
*Defendants*.

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[Filed Feb. 24, 2011]

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## COMPLAINT FOR RESCISSION, DAMAGES, & JURY TRIAL

Plaintiff, as and for his Complaint against Defendants, states and alleges as follows:

### I. Preliminary Statement

1. Plaintiffs Larry and Cheryle Jesinoski bring this action against COUNTRYWIDE HOME LOANS, INC., a subsidiary of Bank of America, N.A. d/b/a AMERICA'S WHOLESALE LENDER ("Countrywide"); BAC HOME LOANS SERVICING, a subsidiary of Bank of America, N.A. F/K/A COUNTRYWIDE HOME LOANS SERVICING, L.P. ("BAC"), MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS"), and John and Jane Does 1-10 to:

a) Enforce a rescission;

b) Reimburse all fees and costs paid in a consumer credit transaction pursuant to violations of the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* ("TILA"), and its implementing regulations at 12 C.F.R. § 226 *et seq.* (Reg. Z);

c) Assert violations of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2605 ("RESPA"); and,

d) Rescind and cancel a Mortgage security interest.

2. A rescission action may be brought against an assignee, regardless of whether the assignee is a "creditor" or whether the violation was apparent on the face of the disclosure statement under 15 U.S.C. § 1641(c).

3. All claims amount to a serious breach of Defendants' fiduciary duties and will result in an irregular and wrongful forced sale foreclosure if not enjoined.

4. The Defendants are proper parties to be sued for claims arising out of the transaction when Defendants are attempting to enforce *contractual obligations* in a foreclosure and the consumer is in an affirmative or defensive position asserting a rescission claim under TILA; Reg. Z, and asserting other statutory relief under RESPA, Minnesota law, and for any claims in recoupment and set-off against all Defendants.

## II. Parties

5. Plaintiffs Larry and Cheryle Jesinoski are consumers and natural persons as that term is defined under 15 U.S.C. § 1602(h). Plaintiffs have rights as a citizen domiciled here in Minnesota, the owners of the *principal dwelling* known as 4165 Cashell Glen Eagan, MN 55122 (hereinafter the "Property") and at all times relevant and material hereto, reside on the Property as their family home.

6. Defendant COUNTRYWIDE HOME LOANS, INC. d/b/a AMERICA'S WHOLESALE LENDER ("Countrywide"), is a subsidiary of Bank of America, N.A. America's Wholesale Lender is a trademark of Countrywide Home Loans, Inc. Otherwise, Countrywide is creditor as that term is defined under 15 U.S.C. § 1602(f); Reg. Z § 226.2(a)(17) and at all times relevant hereto is regularly engaged in the business of extending consumer credit for which a finance charge is or may be imposed and is payable in more than four installment by written agreement. Countrywide maintains minimum contacts in this forum, a principal office in California, and may be served with service of process by serving the parent and Officer in Charge c/o Bank of America, N.A., Kenneth D. Lewis, CEO 100 Tryon Street Charlotte, North Carolina 28255 and by serving its registered agent in Minnesota, CT Corporation Systems, Inc. 100 S 5th Street #1075 Minneapolis, MN 55402.

7. Defendant BAC HOME LOANS SERVICING LP ("BAC") a subsidiary of Bank of America N.A. F/K/A as COUNTRYWIDE HOME LOANS SERVICING, LP is a Texas Limited Partnership and maintains a principal office in California. BAC claims a pecuniary interest or has been assigned an ownership interest by virtue of its representations to Plaintiffs and is joined and needed for just adjudication. BAC may be served with service of process by serving the parent and Officer in Charge c/o Bank of America, N.A., Kenneth D. Lewis, CEO 100 Tryon Street Charlotte, North Carolina 28255 and by serving its registered agent in Minnesota, CT Corporation Systems, Inc. 100 S 5th Street #1075 Minneapolis, MN 55402.

8. Defendant MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS") is a Delaware

Corp. and a subsidiary of MERSCORP, Inc. MERS is an electronic registry and clearinghouse established to track ownership or changes thereof, servicing rights in mortgages, corporate names and mergers. Due to the inherent cost of public registry associated with numerous and multiple transfers of loan pools and their changes of ownership interest in the secondary mortgage market, MERS eliminates this expense contrary to public policy and state regulatory conveyance devices established in conventional lending practices. This entity is an assignee by virtue of its disclosed status as a "Nominee for Lender, its Successors or Assigns," and is needed for just adjudication. MERS may be served with service of process by serving the Officer in Charge at its principal office c/o MERSCORP, Inc., R. K. Arnold, President, CEO 1818 Library Street Suite 300 Reston, VA 20190.

9. Defendants John and Jane Does 1-10 are involved in the instant case and transaction and are currently unknown to Plaintiff. Said entities will be joined upon further discovery of their true nature and liability once these facts are known and supported by competent evidence.

## III. Jurisdiction/Venue

10. This Court has Jurisdiction in this proceeding pursuant to 28 U.S.C. § 1331, pursuant to 15 U.S.C. § 1640(e) for TILA claims, pursuant to 12 U.S.C. § 2614 for RESPA claims, and pursuant to 28 U.S.C. § 1367 for supplemental jurisdiction of Plaintiff's state law claims because Plaintiff's claims are so related to the claims within the Court's original jurisdiction that they form part of the same case or controversy under Article 3 of the United States Constitution. The Court has authority to issue a declaratory judgment by virtue of 28 U.S.C. § 2201 and Minn. Stat. § 555.01 *et seq*. Counts arising under

contract, common law, and the law of conveyances in real property are properly asserted under this Court's pendent jurisdiction.

11. Venue is proper under Chapter 542 of the Minnesota Statutes including Minn. Stat. § 542.02 as Plaintiffs' Home is located in Dakota County and a substantial part of the events and claims, the subject of this suit, are situated here, including unlawful communications of Defendants' defiance to seek judicial guidance are in this district, and Defendants' business practices are within the forum state of Minnesota.

## IV. Conditions Precedent

12. All conditions precedent have been performed or have occurred and, at minimum, TILA; Reg. Z violations may be asserted affirmatively and defensively as a recoupment or set-off pursuant to 15 U.S.C. § 1638 *et seq*. The mere loss of a statutory right to disclosure is an injury that gives the consumer standing for Article III purposes.

13. Plaintiffs have standing as of the date of the contract and where the contract is a federally related mortgage transaction governed by TILA; Reg. Z and due to the foreclosure filing recorded in the official records.

## V. Statement of Facts Material to the Transaction

14. The original application, and federally related mortgage transaction at the root of this case was closed on or about February 23, 2007 (the "Closing").

15. Plaintiff's application is a mortgage loan consolidation and refinanced a previous mortgage loan transaction covering real property then and now the primary *principal dwelling* and home of the Plaintiffs.

16. At the purported Closing, Plaintiffs entered into a mortgage loan transaction (hereinafter the "Transaction") naming Countrywide DBA America's Wholesale Lender as the originator and was provided with copies of various documents material to this case.

17. At the purported Closing, Countrywide designated MERS as a mortgagee and nominee for Lender and Lender's successors and assigns and assigned MERS an interest in the Transaction and MERS remains a pecuniary interest therein.

18. The Transaction required Plaintiffs to pay money arising out of a transaction in which money, property, or goods and services were the subject thereof and the same were primarily for personal, family and household purposes.

19. The security interest was not created to finance the acquisition or initial construction of Plaintiffs' Property and paid off multiple consumer debts.

20. The Transaction and all Closing documents were described to Plaintiffs at the Closing and characterize a *Consumer Credit Transaction* as that term is defined under 15 U.S.C. § 1602(h) and Reg. Z § 226.2(a).

21. Accordingly, the Plaintiffs read the TILA Disclosure Statement, the Itemization of Amount Financed, and understood the prepaid Finance Charges being disclosed at the Closing. However, if the Plaintiffs would have known prior to Closing that additional Finance Charges were actually allocated to the Amount Financed, further itemized on the HUD – 1 Settlement Statement, they would have sought and obtained a lower Finance Charge price and annual percentage rate ("APR").

22. The Transaction is, in fact, a Closed-end Credit Transaction as that term is defined in Reg. Z § 226.2(10) where a security interest was retained in favor of MERS acting as a nominee for Lender and Lender's successors and assigns and as the beneficiary.

23. The Transaction is subject to all disclosure requirements set forth in 15 U.S.C. § 1635(a), and 15 U.S.C. § 1638; Reg. Z §§ 226.17-226.23.

24. The material documents specifically identified all failed in one or more material respects to disclose to the Plaintiff in a form and manner required by applicable statute and regulation, the true nature and cost of this Transaction.

25. Countrywide ratified this transaction with ineffective Notice of Right to Cancel and ineffective Truth in Lending Disclosures.

26. Specifically, Countrywide failed to provide four (4) copies of the Notice of the Right to Cancel in a form Plaintiffs could retain.

27. In addition, the total of "Finance Charges" computed is understated, varies by more than $100.00, and is sufficiently understated to exceed the $35.00 tolerance pursuant to Reg. Z 226.23(h)(2)(i) *Special rules for foreclosures; Tolerance for disclosures.*

28. The failure to accurately disclose the "Finance Charge" fees allocated in this Transaction from origination to present is a failure to provide a *material* disclosure as that term is defined under 15 U.S.C. § 1602(u); Reg. Z § 226.23(a)(3) n.48.

29. The foregoing failures to provide said *material* disclosures under 15 U.S.C. § 1602(u); Reg. Z 226.23(h)(2)(i); Reg. Z § 226.17(d); and proper rescission notices under 15 U.S.C. § 1635(a); Reg. Z

§ 226.23(b)(1), statutorily extends the right to rescind for three-years (3) under 15 U.S.C. § 1635(f).

30. On or about February 23, 2010; Plaintiffs sent a timely valid Rescission Notice to all known interested Parties.

31. On or about March 12th, 2010, BAC refused to answer refused to honor Plaintiff's valid Rescission.

32. Countrywide and MERS failed to respond to Plaintiffs' valid Recission.

33. Defendants' response is unlawful, negligent, intentionally refuses to honor a valid rescission, intentionally misapplies payments and imposes finance charges and other charges.

34. Defendants collectively have failed to timely seek judicial guidance and fully comply with Plaintiffs' application to rescind the Transaction.

35. A controversy has arisen due to Defendants failure to credit all previous payments so that Plaintiff may tender any balance and extinguish the Transaction by operation of law.

36. As of this date, all Defendants have been made aware of the TILA and Reg. Z violations.

37. The foregoing acts and omissions of the Defendants were undertaken willfully, persistently, intentionally, knowingly, and/ or in gross or reckless disregard of the rights of the Plaintiffs.

## VI. Claims for Relief

### Count 1 – Failure to Rescind under TILA & Reg. Z Against All Defendants

38. Plaintiffs incorporate each paragraph set forth above as if fully stated herein.

39. As a result of Defendants' failure to provide accurate *material* disclosures correctly with a proper Notice of Right of Rescission described above, Plain-

tiffs are entitled and have exercised his right of rescission of the Transaction.

40. Rescission of the Transaction extinguishes any liability Plaintiffs have to Defendants for finance or other charges arising from the Transaction.

41. Defendants' failure to take any action to reflect the termination of the security interest in the Property within twenty (20) days of rescission or seek judicial guidance releases Plaintiffs from any liability whatsoever to Defendants arising from the Transaction.

42. Defendants have a fiduciary duty and obligation to perform upon notice of rescission by canceling this specific Transaction as well as any enforcement thereof. Accordingly, any alleged security instrument is void and unenforceable under 15 U.S.C. § 1635(b).

43. Defendants had twenty-days (20) to refund or credit the alleged account all monies paid and to void the security interest and Defendants have failed in their obligation to perform this duty and make a tender offer.

44. The Defendants have ignored the rescission notice and forfeited their right to receive any tender amount whereby the property implicitly vests in the Plaintiff.

45. Defendants performance is a condition precedent to Plaintiff's duty to tender and failure to lawfully respond gives rise to statutory and actual damages under 15 U.S.C. § 1640.

46. Any further acts to enforce an invalid security instrument and impose finance charges are wrongful, improper, and a serious breach of fiduciary duty associated with Defendants' obligations. Such acts violate TILA; Reg. Z, RESPA, and are contrary to the

explicit statutory requirements and contract between the parties.

47. Defendants have proceeded to unlawfully impose finance charges, and unlawfully initiate and continue a foreclosure proceeding by posting a sale date.

48. The foregoing acts and omissions of the Defendants were undertaken willfully, persistently, intentionally, knowingly, and/or in gross or reckless disregard of the rights of the Plaintiff.

49. Said acts entitle Plaintiff to statutory and actual relief and orders enforcing rescission, and a reasonable attorney fee.

## VII. Jury Trial Demand

Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and hereby demands, a trial by jury.

## VIII. Prayer for Relief

WHEREFORE, as a result of the violations of TILA, pursuant to 15 U.S.C. §§ 1635(a), 1640(a), 1641(c), Plaintiffs pray for judgment against Defendants as follows:

1. Rescission of this transaction,

2. Termination of any security interest in Plaintiff's property created under the transaction,

3. Return of any money or property given by the Plaintiff to anyone, including all Defendants, in connection with this transaction,

4. Statutory damages of no less than $2,000 for the disclosure violation as provided under 15 U.S.C. § 1640(a),

5. Statutory damages of $4,000 for Defendants' failure to respond properly to Plaintiff's rescission

notice, and $4000 for each subsequent event that is contrary to TILA,

6. Forfeiture of return of loan proceeds,

7. Order that, if Defendants fail to further respond lawfully to Plaintiff's valid Rescission Notice, Plaintiff has no duty to tender, but in the alternative, if tender is required, determine the amount of the tender obligation in light of Plaintiff's claims, and order Defendants to accept tender on reasonable terms and over a reasonable period of time,

8. Actual damages in an amount to be determined at trial,

9. Reasonable attorney fee and costs of suit,

10. For such other and further relief as the Court may deem just and proper.

Dated: February 23rd, 2010

KEOGH LAW OFFICE
By s /Michael J. Keogh
Michael J. Keogh (#0286515)
P.O. Box 11297
St. Paul, Minnesota 55111
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***Attorney for Plaintiffs***

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**ST. PAUL, MINNESOTA 55111**
**TEL (612) 644-2861; FAX (651) 354-2533**

July 8th, 2011

RE: Jesinoski v. Countrywide, et al

Case No: 11cv474 (DWF/FLN) / U.S. District Court for the District of Minnesota

Re: June 28, 2011 Order (Docket No. 2)

Dear Judge Noel,

I'm submitting this letter in response to your Order of June 28, 2011 and following a call to your Chambers to secure permission to file this letter. The Summons and Complaint in this matter was served upon the Defendants (BAC, Countrywide, and MERS) during the last few days of the 120 days for service mandated by Fed. R. Civ. P. 4(m). Affidavits of Service were recently received and will be filed on ECF shortly.

Yesterday afternoon, I was contacted by Mr. Andre Hanson of Fulbright & Jaworski who informed me he had been engaged as defense counsel for all Defendants.

Sincerely,

s/ Michael J. Keogh

Michael Keogh
Attorney for Larry and Cheryle Jesinoski

Cc: Andre Hanson

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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Court File No. 11-CV-474 (DWF/FLN)

LARRY D. JESINOSKI AND CHERYLE JESINOSKI, INDIVIDUALS,
*Plaintiffs*,

v.

COUNTRYWIDE HOME LOANS, INC., D/B/A AMERICA'S WHOLESALE LENDER, SUBSIDIARY BAC HOME LOANS SERVICING, LP, A SUBSIDIARY OF BANK OF AMERICA N.A., ET AL.,
*Defendants*.

---

[Filed July 22, 2011]

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**AMENDED COMPLAINT FOR RECISSION, DAMAGES, & JURY TRIAL**

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE

**I. Preliminary Statement**

1. Plaintiffs Larry and Cheryle Jesinoski bring this action against COUNTRYWIDE HOME LOANS, INC., a subsidiary of Bank of America, N.A. d/b/a AMERICA'S WHOLESALE LENDER ("Countrywide"); BAC HOME LOANS SERVICING, a subsidiary of Bank of America, N.A. F/K/A COUNTRYWIDE HOME LOANS SERVICING, L.P. ("BAC"), MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS"), and John and Jane Does 1 –10 to:

a) Enforce a rescission for their loan;

b) Reimburse all fees and costs paid in a consumer credit transaction pursuant to violations of the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* ("TILA"), and its implementing regulations at 12 C.F.R. § 226 *et seq.* (Reg. Z);

c) Rescind and cancel a Mortgage security interest;

d) Assert state law claims under Minn. Stat. § 58.13 *et seq.*

2. A rescission action may be brought against an assignee, regardless of whether the assignee is a "creditor" or whether the violation was apparent on the face of the disclosure statement under 15 U.S.C. § 1641(c).

3. All claims amount to a serious breach of Defendants' fiduciary duties and will result in an irregular and wrongful forced sale foreclosure if not enjoined.

4. Plaintiffs also seek declaratory and injunctive relief to further restrain Defendants under Minn. Stat. 58.13 and others. All such Minnesota state law claims are properly asserted under this Court's pendent or supplemental jurisdiction.

5. The Defendants are proper parties to be sued for claims arising out of the transaction when Defendants are attempting to enforce *contractual obligations* in a foreclosure and the consumer is in an affirmative or defensive position asserting a rescission claim under TILA; Reg. Z, and asserting other statutory relief under Minnesota law, against all Defendants.

## II. Parties

6. Plaintiffs Larry and Cheryle Jesinoski are consumers and natural persons as that term is defined under 15 U.S.C. § 1602(h). Plaintiffs have rights as a citizen domiciled here in Minnesota, the owners of

the *principal dwelling* known as 4165 Cashell Glen Eagan, MN 55122 (hereinafter the "Property") and at all times relevant and material hereto, reside on the Property as their family home.

7. Defendant COUNTRYWIDE HOME LOANS, INC. d/b/a AMERICA'S WHOLESALE LENDER ("Countrywide"), is a Predecessor in interest to BAC. America's Wholesale Lender is a trademark of Countrywide Home Loans, Inc. Otherwise, Countrywide is creditor as that term is defined under 15 U.S.C. § 1602(f); Reg. Z § 226.2(a)(17) and at all times relevant hereto is regularly engaged in the business of extending consumer credit for which a finance charge is or may be imposed and is payable in more than four installment by written agreement. Countrywide maintains minimum contacts in this forum, a principal office in California, and may be served with service of process by serving the parent and Officer in Charge c/o Bank of America, N.A., Kenneth D. Lewis, CEO 100 Tryon Street Charlotte, North Carolina 28255 and by serving its registered agent in Minnesota, CT Corporation Systems, Inc. 100 S 5th Street #1075 Minneapolis, MN 55402.

8. Defendant BAC HOME LOANS SERVICING LP ("BAC") a subsidiary of Bank of America N.A. F/K/A as COUNTRYWIDE HOME LOANS SERVICING, LP is a Texas Limited Partnership and maintains a principal office in California. BAC claims a pecuniary interest or has been assigned an ownership interest by virtue of its representations to Plaintiffs and is joined and needed for just adjudication. BAC may be served with service of process by serving the parent and Officer in Charge c/o Bank of America, N.A., Kenneth D. Lewis, CEO 100 Tryon Street Charlotte, North Carolina 28255 and by serving its registered agent in Minnesota, CT Corporation Sys-

tems, Inc. 100 S 5th Street #1075 Minneapolis, MN 55402.

9. Defendant MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS") is a Delaware Corp. and a subsidiary of MERSCORP, Inc. MERS is an electronic registry and clearinghouse established to track ownership or changes thereof, servicing rights in mortgages, corporate names and mergers. Due to the inherent cost of public registry associated with numerous and multiple transfers of loan pools and their changes of ownership interest in the secondary mortgage market, MERS eliminates this expense contrary to public policy and state regulatory conveyance devices established in conventional lending practices. This entity is an assignee by virtue of its disclosed status as a "Nominee for Lender, its Successors or Assigns," and is needed for just adjudication. MERS may be served with service of process by serving the Officer in Charge at its principal office c/o MERSCORP, Inc., Paul Bognanno, President, CEO 1818 Library Street Suite 300 Reston, VA 20190.

10. Defendants John and Jane Does 1-10 are involved in the instant case and transaction and are currently unknown to Plaintiff. Said entities will be joined upon further discovery of their true nature and liability once these facts are known and supported by competent evidence.

## III. Jurisdiction/Venue

11. This Court has Jurisdiction in this proceeding pursuant to 28 U.S.C. § 1331, pursuant to 15 U.S.C. § 1640(e) for TILA claims and pursuant to 28 U.S.C. § 1367 for supplemental jurisdiction of Plaintiffs' state law claims because Plaintiffs' claims are so related to the claims within the Court's original

jurisdiction that they form part of the same case or controversy under Article 3 of the United States Constitution. The Court has authority to issue a declaratory judgment by virtue of 28 U.S.C. § 2201. Counts arising under contract, common law, and the law of conveyances in real property are properly asserted under this Court's pendent jurisdiction.

12. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 generally whereby the real property and a substantial part of the events and claims, the subject of this suit, are situated here, including unlawful communications of Defendants' defiance to seek judicial guidance are in this district, and Defendants' business practices are within the forum state of Minnesota.

## IV. Conditions Precedent

13. All conditions precedent have been performed or have occurred and, at minimum, TILA; Reg. Z violations may be asserted affirmatively and defensively as a recoupment or set-off pursuant to 15 U.S.C. § 1638 *et seq*. The mere loss of a statutory right to disclosure is an injury that gives the consumer standing for Article III purposes.

14. Plaintiffs has standing as of the date of the contracts and where the contract are federally related mortgage transactions governed by TILA; Reg. Z.

## V. Statement of Facts Material to the Transaction

15. This Complaint concerns a single family residential property located at 4165 Cashell Glen Eagan, MN 55122 (hereinafter the "Property").

16. Prior to 2007, Plaintiffs purchased the Property which they had since occupied as their primary residence.

17. On or about February 23rd, 2007, Plaintiffs executed a promissory note for $611,000 in favor of America's Wholesale Lender and Mortgage Electronic Registration Systems, Inc.

18. The purpose of the transaction was to refinance a previous mortgage loan transaction covering real property then and now the primary *principal dwelling* and home of the Plaintiffs.

19. At the purported Closing, Plaintiffs were provided with *one* document bearing the name "Truth In Lending Disclosure Statement" (hereinafter TIL disclosure). A true and accurate copy of the sole and single TIL disclosure statement provided to Plaintiffs is attached hereto and incorporated fully herein as EXHIBIT A.

20. At the purported Closing, Plaintiffs were provided with *two* documents bearing the name "Notice of Right to Cancel" (hereinafter Notice to Cancel). A true and accurate copies of the statement provided to Plaintiffs is attached hereto and incorporated fully herein as EXHIBIT B.

21. The Transaction required Plaintiffs to pay money arising out of a transaction in which money, property, or goods and services were the subject thereof and the same were primarily for personal, family and household purposes.

22. The security interest was not created to finance the acquisition or initial construction of Plaintiffs' Property and paid off multiple consumer debts.

23. The promissory note indicates that payments are to be initially made to America's Whole Lender which is a business name of Countrywide Home Loans, Inc ("Countrywide").

24. Countrywide is therefore a "creditor" for the purposes of the Truth In Lending Act.

25. The mortgage security instrument indicates that rights under the mortgage and promissory note are transferred to MERS "solely as Nominee for Lender and Lender's successors and assigns".

26. On information and belief, MERS is therefore an assignees under 15 U.S.C. § 1641.

27. On information and belief, BAC as Countrywide's successor is also an assignee under 15 U.S.C § 1641.

28. After closing, Plaintiff received notice to direct payments to Americas Whole Lender and subsequently received notice to direct payment to BAC.

29. On information and belief, BAC is a "residential mortgage servicer" and Countrywide is a "residential mortgage originator": pursuant respectively to Minn. Stat. § 58.02 Subd. 20 and 19.

30. On February 23, 2010 Plaintiffs exercised their right to rescind the mortgage transaction in writing by certified mail, return receipt requested, to all known parties in interest.

31. Although Defendants received Plaintiff's notice of recission, and twenty days followed thereafter, but Defendants took no steps to cancel the security interest.

32. On March 12, 2010, BAC via letter refused to accept Plaintiffs' valid recission.

33. No Defendant other than BAC has responded to the recission notice mailed on February 23, 2010.

## VI. Claims for Relief

## DEMAND FOR RECISSION

34. Plaintiffs hereby rescind the mortgage and related instruments and exercise their right pursuant to the Truth in Lending Act (TILA). 15 U.S.C. 1635 and Reg. Z § 226.23. Plaintiff hereby offer to tender the Property and/or appropriate amount due after Defendants return all moneys paid and cancel the security interest pursuant to 15 U.S.C. § 1635 and Reg. Z. § 226.23.

### Count 1

### TRUTH IN LENDING ACT, 15 U.S.C. § 1601 et seq.

35. Plaintiff realleges all prior paragraphs of this Complaint.

36. The Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* ("TILA"), and its implementing regulations at 12 C.F.R. § 226 *et seq.* ("Reg. Z") ("collectively "TILA") are intended to protect consumers prior to placing a mortgage lien on their home by requiring certain mandatory disclosure be given to the consumer prior to the mortgage transaction.

37. Defendant Countrywide DBA America's Wholesale Lender is the creditor as defined under 15 U.S.C. § 1602(f); Reg. Z § 226.2(a)(17) or an assignee of the promissory note and/or mortgage secured to the Property as defined in 15 U.S.C. § 1641.

38. Defendant MERS is the creditor or assignee of the promissory note and/or mortgage secured to the Property as defined in 15 U.S.C. § 1641.

39. Defendant BAC is the creditor or assignee of the promissory note and/or mortgage secured to the Property as defined in 15 U.S.C. § 1641.

40. Plaintiffs were "consumers" as defined by 15 U.S.C. § 1602(h) and Reg. Z § 226(a)(11).

41. The extension of credit on February 23rd, 2007 is a *Consumer Credit Transaction* as that term is defined under 15 U.S.C. § 1602(h) and Reg. Z § 226.2(a)(12).

42. The Transaction is, in fact, a Closed-end Credit Transaction as that term is defined in Reg. Z § 226.2(10) where a security interest was retained in favor of MERS acting as a nominee for Lender and Lender's successors and assigns and as the beneficiary.

43. The Transaction involving is subject to all requirements set forth in 15 U.S.C. § 1635(a), and 15 U.S.C. § 1638; Reg. Z §§ 226.17 – 226.23.

44. The promissory note secured a "principal dwelling" within the meaning of TILA there by subjecting the principal dwelling to a security interest within the meaning of Reg Z. § 226.1(b).

45. The February 23, 2010 Transaction was not a "residential mortgage transaction" within the meaning of 15 U.S.C. § 1602(w).

46. The consumer credit transaction was subject to Plaintiff's right of recission under TILA as described in 15 U.S.C. § 1635 and Reg. Z § 226.23.

47. For each of the above consumer credit transactions, Defendant failed to provide *each* Plaintiff with:

a. all required disclosures prior to consummation of the transaction in violation of 15 U.S.C. § 1638(b) and Reg. Z § 226.17(b).

b. Two copies *each* of the Notice of Right to Cancel in a form they could retain as required by 15 U.S.C. § 1635(a) and Reg. Z § 226.23(b).

c. a TIL disclosure statement to *each* consumer pursuant to Reg. Z § 226.17(d).

48. Under TILA, a consumer whose lender fails to provide the disclosures described above retains the continuing right to rescind the transaction until the third business day after receiving both the notice and all material disclosures described above, pursuant 15 U.S.C. § 1635(a) and Reg. Z § 226.23(a)(3) for up to three years after the date of consummation.

49. Plaintiffs have retained the right of recission.

50. As a result of Defendants' violations of TILA, Countrywide and or MERS and or BAC is liable to Plaintiffs as provided under 15 U.S.C. § 1640.

51. Plaintiffs relied on Defendant's inaccurate material disclosures, and suffered a detriment as a result.

52. Plaintiffs have been damaged.

**Count 2 – Recission of Security Interest**

53. Plaintiffs re-allege all prior paragraphs of this Complaint.

54. Plaintiffs request this court declare the mortgage transaction rescinded.

55. Plaintiffs further request that this court declare that Defendants failed to take action to effect a cancellation of the security interest within 20 days.

56. Plaintiff request that this court declare they have complied with their obligations under the Truth in Lending Act and have no obligation under the properly rescinded transaction. As no tender obligation has arisen, Plaintiff requests they be allowed to retain such funds or be granted a modification as the Court deems equitable.

**Count 3**

**Servicing a Mortgage Loan in Violation Of Standards of Conduct**

**Minn. Stat. § 58.13**

57. Plaintiffs re-allege all paragraphs of this Complaint.

58. Minn. Stat. 58.13 provides that certain standards apply to a person "acting as a residential mortgage originator or servicer including a person required to be licensed under" Chapter 58 of the Minnesota Statutes.

59. BAC was acting as a "residential mortgage servicer" as defined under Minn. Stat. § 58.02 subd. 20 and a "residential mortgage originator" under Minn. Stat. § 58.02 subd. 19.

60. Minn. Stat. § 58.13, subd. 1(8) provides it is unlawful for such a residential originator or servicer to:

> [V]iolate any provision of any applicable state or federal law regulating mortgage loans including, without limitation, sections 47.20 to 47.208.

61. Countrywide and BAC violated the Federal Truth in Lending Act by failing to effect recission.

62. As a result of the aforesaid violations, Countrywide and BAC is liable to Plaintiffs for:

A. Actual, incidental, and consequential damages;

B. Statutory damages equal to the amount of all lender fees included in the amount of the principal of the residential mortgage loan;

C. Attorney's fees and costs; and

D. Such other relief as this Court deems appropriate.

**Count 4**

**Plaintiffs' Cause of Action under Minn. Stat. § 8.31**

63. Plaintiffs reallege all prior paragraphs of their Complaint.

64. This action is in the public interest.

65. "A borrower injured by a violation of the standards, duties, prohibitions or requirements of section 58.13, 58.136, 58.137, and 58.16 may also bring an action under section 8.31. A private right of action by a borrower under this chapter is in the public interest." 58.18 subd. 2.

## VII. Jury Trial Demand

Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and hereby demands, a trial by jury.

## VIII. Prayer for Relief

WHEREFORE, Plaintiffs respectfully request that judgment be entered against Defendants as follows:

I. Rescission of this transaction under the Truth in Lending Acts;

II. Award Plaintiff statutory damages in the amount of not less than $400 or greater than $4000, pursuant to 1640(a)(2)(iv) for failure to rescind;

III. Award Plaintiff statutory damages in the amount of not less than $400 or greater than $4000, pursuant to 1640(a)(2)(iv) for each subsequent event that is contrary to TILA;

IV. Award actual damages for each cause of action, when appropriate, in an amount to be established at trial;

V. Declaring that the Property is properly owned by Plaintiff, free and clear, of Defendants' interest or any liens attached as a result of Defendants' interest.

VI. Declaring no tender obligation arose when Defendants failed to take measures to perfect recission or modify the terms of recission as the court deems equitable.

VII. Awarding actual, incidental, and consequential damages against Countrywide and or BAC under Minn. Stat. § 58.18, subd. 1(1) as well as statutory damages for each violation of Chapter 58 of the Minnesota Statutes in an amount equal to all lender fees included in the principal of the residential mortgage loan under Minn. Stat. § 58.18, subd. 1(2).

VIII. Awarding Plaintiff her costs, including costs of investigation and attorney's fees, if any, as authorized by 15 U.S.C. § 1640(a)(3) and Minn. Stat. § 58.18 and 8.31, subdivision 3a.

IX. If required, temporarily enjoin Defendants from evicting or otherwise dispossessing Plaintiffs from the property until this matter is fully adjudicated pursuant to Minn. Stat. § 58.18 and 8.31, subdivision 3a.

X. Awarding such other relief as the Court deems just and proper.

Dated: July 22th, 2011

KEOGH LAW OFFICE

s/ Michael J. Keogh

Michael J. Keogh (#0286515)
P.O. Box 11297
St. Paul, Minnesota 55104
Telephone (612) 644-2861
***Attorney for Plaintiffs***

Prepared by: AMANDA SUNDELL

# TRUTH IN LENDING DISCLOSURE STATEMENT

(THIS IS NEITHER A CONTRACT NOR A COMMITMENT TO LEND)

LENDER: AMERICA'S WHOLESALE LENDER

4500 Park Granada
Calabasas, CA 91302-1613

☐ Preliminary ☒ Final

DATE 02/23/2007

BORROWERS: LARRY D JESINOSKI

LOAN / CASE NO: 159328356

Type of Loan: CONV UNINSURED NC ARM LIBR 5/1 EC 10yIO 525

ADDRESS: 4165 CASHELL GLEN
CITY STATE / ZIP: EAGAN, MN 55122
PROPERTY: 4165 CASHELL GLEN
EAGAN, MN 55122

| ANNUAL PERCENTAGE RATE<br>The cost of your credit as a yearly rate | FINANCE CHARGE<br>The dollar amount the credit will cost you. | Amount Financed<br>The amount of credit provided to you or on your behalf | Total of Payments<br>The amount you will have paid after you have made all payments as scheduled. |
|---|---|---|---|
| 7.179 % | $ 1,010,896.36 | $ 605,540.38 | $ 1,616,436.74 |

PAYMENT SCHEDULE:

| NUMBER OF PAYMENTS | AMOUNT OF PAYMENTS | WHEN PAYMENTS ARE DUE |
|---|---|---|
| 60 | 3,182.29 | MONTHLY BEGINNING 04/01/2007 |
| 60 | 3,882.40 | MONTHLY BEGINNING 04/01/2012 |
| 239 | 4,968.98 | MONTHLY BEGINNING 04/01/2017 |
| 1 | 4,969.12 | LAST PAYMENT DUE 03/01/2037 |

DEMAND FEATURE: ☒ This loan does not have a Demand Feature ☐ This loan has a Demand Feature as follows:

VARIABLE RATE FEATURE:
☒ This loan has a Variable Rate Feature. Variable Rate Disclosures have been provided to you earlier

SECURITY: You are giving a security interest in the property located at:
4165 CASHELL GLEN, EAGAN, MN 55122

ASSUMPTION: Someone buying this property ☐ cannot assume the remaining balance due under original mortgage terms
☒ may assume, subject to lender's conditions, the remaining balance due under original mortgage terms.

PROPERTY INSURANCE: Hazard insurance, including flood insurance if the property is in a Special Flood Hazard Area, is required as a condition of this loan. You may obtain the insurance coverage from any insurance company acceptable to the lender. Complete details concerning insurance requirements will be provided prior to loan closing.

LATE CHARGES: If your payment is more than 15 days late, you will be charged a late charge of 5.000% of the overdue payment.

PREPAYMENT: If you pay off your loan early, you
☐ may ☒ will not be entitled to a refund of part of the finance charge.
☐ may ☒ will not have to pay a penalty.

See your contract documents for any additional information regarding non-payment, default, required repayment in full before scheduled date, and prepayment refunds and penalties.

I/We hereby acknowledge reading and receiving a complete copy of this disclosure

BORROWER LARRY D JESINOSKI — DATE

BORROWER CREAYLE L JESINOSKI — DATE

BORROWER — DATE

BORROWER — DATE



* 23801 *

EXHIBIT A

* 1593285580000002C298 *

37

# NOTICE OF RIGHT TO CANCEL

**RESCISSION-DIFFERENT LENDER**

**REFINANCE**

Prepared by AMANDA SUNDELL

AMERICA'S WHOLESALE LENDER

DATE: 02/22/2007
BORROWER: LARRY D. JESINOSKI
CASE #:
LOAN #: 159328556
PROPERTY ADDRESS: 4165 CASHELL GLEN
EAGAN, MN 55122

Branch #: 0000989
1907 E WAYZATA BLVD #200
WAYZATA, MN 55391
Phone: (952)404-6580
Br Fax No.: (W)

38

## YOUR RIGHT TO CANCEL

You are entering into a transaction that will result in a mortgage/lien/security interest on/in your home. You have a legal right under federal law to cancel this transaction, without cost, within THREE BUSINESS DAYS from whichever of the following events occurs last:

(1) The date of the transaction, which is 02/23/2007 ; or
(2) The date you received your Truth in Lending disclosures; or
(3) The date you received this notice of your right to cancel.

If you cancel the transaction, the mortgage/lien/security interest is also cancelled. Within 20 CALENDAR DAYS after we receive your notice, we must take the steps necessary to reflect the fact that the mortgage/lien/security interest on/in your home has been cancelled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 CALENDAR DAYS of your offer, you may keep it without further obligation.

## HOW TO CANCEL

If you decide to cancel this transaction, you may do so by notifying us in writing, at:

AMERICA'S WHOLESALE LENDER
1907 E WAYZATA BLVD #200
WAYZATA, MN 55391

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than MIDNIGHT of 02/27/2007 (or MIDNIGHT of the THIRD BUSINESS DAY following the latest of the three events listed above.) If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

**I WISH TO CANCEL**

SIGNATURE _____ DATE _____

The undersigned each acknowledge receipt of two copies of NOTICE of RIGHT TO CANCEL and one copy of the Federal Truth in Lending Disclosure Statement.

Each borrower/owner in this transaction has the right to cancel. The exercise of this right by one borrower/owner shall be effective to all borrowers/owners.

BORROWER/OWNER LARRY D. JESINOSKI — DATE
BORROWER/OWNER CHERYLE L. JESINOSKI — DATE
BORROWER/OWNER — DATE
BORROWER/OWNER — DATE

CHL (04/03)(d) — 1948

*23981*

EXHIBIT B

*1593285560000002004-*

## NOTICE OF RIGHT TO CANCEL

**RESCISSION-DIFFERENT LENDER**

**REFINANCE**

Prepared by: AMANDA BURDELL

**AMERICA'S WHOLESALE LENDER**

DATE: 02/22/2007
BORROWER: LARRY D. JESIONSKI
CASE #:
LOAN #: 159328556
PROPERTY ADDRESS: 4165 CASHELL GLEN
EAGAN, MN 55122

Branch #: 0000989
1907 E WAYZATA BLVD #200
WAYZATA, MN 55391
Phone: (952)404-6300
Br Fax No.: (W)

39

### YOUR RIGHT TO CANCEL

You are entering into a transaction that will result in a mortgage/lien/security interest on/in your home. You have a legal right under federal law to cancel this transaction, without cost, within THREE BUSINESS DAYS from whichever of the following events occurs last:

(1) The date of the transaction, which is 02/23/2007 ; or
(2) The date you received your Truth in Lending disclosures; or
(3) The date you received this notice of your right to cancel.

If you cancel the transaction, the mortgage/lien/security interest is also cancelled. Within 20 CALENDAR DAYS after we receive your notice, we must take the steps necessary to reflect the fact that the mortgage/lien/security interest on/in your home has been cancelled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 CALENDAR DAYS of your offer, you may keep it without further obligation.

### HOW TO CANCEL

If you decide to cancel this transaction, you may do so by notifying us in writing, at:

AMERICA'S WHOLESALE LENDER
1907 E WAYZATA BLVD #200
WAYZATA, MN 55391

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than MIDNIGHT of 02/27/2007 (or MIDNIGHT of the THIRD BUSINESS DAY following the latest of the three events listed above.) If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

### I WISH TO CANCEL

SIGNATURE _____ DATE _____

The undersigned each acknowledge receipt of two copies of NOTICE of RIGHT TO CANCEL and one copy of the Federal Truth in Lending Disclosure Statement.

Each borrower/owner in this transaction has the right to cancel. The exercise of this right by one borrower/owner shall be effective to all borrowers/owners.

| BORROWER/OWNER | DATE | BORROWER/OWNER | DATE |
|---|---|---|---|
| LARRY D. JESIONSKI | | CHERYLE L. JESIONSKI | |
| BORROWER/OWNER | DATE | BORROWER/OWNER | DATE |

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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Court File No. 11-CV-474 (DWF/FLN)

LARRY D. JESINOSKI AND CHERYLE JESINOSKI, INDIVIDUALS,
*Plaintiffs*,

v.

COUNTRYWIDE HOME LOANS, INC., D/B/A AMERICA'S WHOLESALE LENDER, A SUBSIDIARY OF BANK OF AMERICA N.A., ET AL.,
*Defendants*.

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[Filed Aug. 22, 2011]

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**DEFENDANTS COUNTRYWIDE HOME LOANS, INC., BAC HOME LOANS SERVICING, AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.'S ANSWER TO PLAINTIFFS' AMENDED COMPLAINT**

For their timely Answer to Plaintiffs Larry D. Jesinoski and Cheryle Jesinoski's ("Plaintiffs") First Amended Complaint, Defendants Bank of America, N.A. ("BANA"), sued herein as "Countrywide Home Loans, Inc.," and "BAC Home Loans Servicing," and Mortgage Electronic Registrations Systems, Inc. ("MERS") (collectively, "Defendants"), deny each and every thing, fact, matter, and allegation set forth therein except as herein qualified, admitted, or otherwise explained.

Defendants presume that all captions, titles, and headings in Plaintiffs' Amended Complaint, including the statements in the preamble titled "Amended Complaint – Action Involving Real Property," are intended to be non-substantive and do not require specific responses; to the extent that they are intended to be substantive allegations, Defendants hereby deny all such assertions. Defendants further respond as follows:

**I. Preliminary Statement:**

1. The allegations in Paragraph purport to state that Plaintiffs have brought an action against certain defendants in order to obtain various relief, and do not call for a response. To the extent a response is called for, Defendants admit that Plaintiffs claim to seek certain relief, but deny that Plaintiffs have set forth a cognizable cause of action to justify such relief, and further deny that Plaintiffs are entitled to any of the relief sought. Defendants further deny that Countrywide Home Loans, Inc., is a subsidiary of BANA, and deny that BAC Home Loans Servicing is a subsidiary of BANA. By way of further statement, Defendants state that effective July 2, 2011, BAC Home Loans Servicing, L.P. entered into a merger with BANA, and that BANA is the surviving entity. Defendants deny the remaining allegations in Paragraph 1 of the Amended Complaint.

2. The allegations in Paragraph 2 of Plaintiffs' Amended Complaint purport to set forth a legal conclusion, to which no response is called.

3. The allegations in Paragraph 3 of the Plaintiffs' Amended Complaint are incoherent. To the extent that the Defendants can understand these allegations, they are denied.

4. The allegations in Paragraph 4 of the Plaintiffs' Amended Complaint purport to state the relief claimed by Plaintiffs, and further sets forth a legal conclusion. To the extent that an answer is called for as to these allegations, Defendants deny that Plaintiffs have set forth a cognizable claim for relief, and further deny that Plaintiffs are entitled to any of the relief purportedly sought.

5. The allegations in Paragraph 5 of Plaintiffs' Amended Complaint purport to set forth a legal conclusion, to which no response is called. To the extent that an answer is called for as to these allegations, Defendants deny that Plaintiffs have set forth a cognizable claim for relief, and further deny that Plaintiffs are entitled to any of the relief purportedly sought.

## II. Parties:

6. With respect to the allegations set forth in the first sentence of Paragraph 6 of the Plaintiffs' Amended Complaint, Defendants are without sufficient knowledge or information to admit or deny these allegations, and accordingly deny same, putting Plaintiffs on their full burden of proof. The allegations in the second sentence of Paragraph 6 purport to set forth a legal conclusion to which no response is called.

7. Defendants admit the allegations in the first sentence of Paragraph 7 of the Plaintiffs' Amended Complaint. The remaining allegations in Paragraph 7 of Plaintiffs' Amended Complaint purport to set forth a legal conclusion, to which no response is called.

8. Defendants admit the allegations in the third sentence of Paragraph 8 of the Plaintiffs' Amended Complaint, and deny the remaining allegations.

9. Defendants admit the allegations in the first and fifth sentences of Paragraph 9 of Plaintiffs' Amended Complaint, and deny the remaining allegations.

10. Defendants are without information sufficient to admit or deny the allegations in Paragraph 10 of the Plaintiffs' Amended Complaint, and accordingly deny same, putting Plaintiffs to their full burden of proof.

**III. Jurisdiction and Venue:**

11. The allegations in Paragraph 11 of Plaintiffs' Amended Complaint purport to set forth legal conclusions, to which no response is called. To the extent a response is called for, Defendants admit that jurisdiction is proper in this Court, and deny the remaining allegations.

12. The allegations in Paragraph 12 of Plaintiffs' Amended Complaint purport to set forth legal conclusions, to which no response is called. To the extent a response is called for, Defendants admit that venue is proper in this Court, and deny the remaining allegations.

**IV. Alleged Conditions Precedent:**

13. The allegations in Paragraph 13 of Plaintiffs' Amended Complaint purport to set forth legal conclusions, to which no response is called. To the extent a response is called for, Defendants deny the allegations in Paragraph 13 of the Amended Complaint.

14. The allegations in Paragraph 14 of Plaintiffs' Amended Complaint purport to set forth legal conclusions, to which no response is called. To the extent a response is called for, Defendants admit that allegations are vague and incoherent and as phrased are not subject to an admission or denial.

## V. Statement of Facts Purportedly Material to the Transaction:

15. The allegations in Paragraph 15 of the Plaintiffs' Amended Complaint purport to frame the nature of the Amended Complaint, and do not call for a response. To the extent that a response is called for, admit that the real property which secured the Plaintiffs' Note is located at 4165 Cashell Glen, Eagan, Minnesota.

16. Defendants admit the allegations in Paragraph 16 of the Amended Complaint.

17. Defendants admit the allegations in Paragraph 17 of the Plaintiffs' Amended Complaint. By way of further statement, Defendants state that these allegations purport to characterize Plaintiffs' February 23, 2007 Note, and allege that the Note is a written document which speaks for itself, and deny all allegations that are inconsistent with or unsupported by the Note.

18. Defendants are without information sufficient to admit or deny the allegations in Paragraph 18 of the Plaintiffs' Amended Complaint, and accordingly deny same, putting Plaintiffs on their full burden to prove same. To the extent that the allegations in Paragraph 18 purport to characterize the February 23, 2007 Note and Mortgage, Defendants allege that these documents are in writing and speak for themselves, and deny all allegations contrary to or unsupported by these documents.

19. Defendants deny the allegations in Paragraph 19, and affirmatively allege that Plaintiffs were provided all required material disclosures at closing.

20. Defendants deny the allegations in Paragraph 20, and affirmatively allege that Plaintiffs were provided all required material disclosures at closing.

21. Defendants are without information sufficient to admit or deny the allegations in Paragraph 21 of the Plaintiffs' Amended Complaint, and accordingly deny same, putting Plaintiffs on their full burden to prove same. To the extent that the allegations in Paragraph 21 purport to characterize the February 23, 2007 Note and Mortgage, Defendants allege that these documents are in writing and speak for themselves, and deny all allegations contrary to or unsupported by these documents.

22. Defendants are without information sufficient to admit or deny the allegations in Paragraph 22 of the Plaintiffs' Amended Complaint, and accordingly deny same, putting Plaintiffs on their full burden to prove same. To the extent that the allegations in Paragraph 22 purport to characterize the February 23, 2007 Note and Mortgage, Defendants allege that these documents are in writing and speak for themselves, and deny all allegations contrary to or unsupported by these documents.

23. The allegations in Paragraph 23 purport to characterize the February 23, 2007 Note, and Defendants allege that this document is in writing and speaks for itself, and deny all allegations contrary to or unsupported by this document.

24. The allegations in Paragraph 24 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called.

25. The allegations in Paragraph 25 of the Plaintiffs' Amended Complaint purport to characterize the February 23, 2007 Mortgage, and Defendants allege that this document is in writing and speaks for itself, and deny all allegations contrary to or unsupported by this document.

26. The allegations in Paragraph 26 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called.

27. The allegations in Paragraph 27 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called.

28. The allegations in Paragraph 28 purport to characterize documents, and Defendants allege that these documents are in writing and speak for themselves, and deny all allegations inconsistent with or contrary to these documents.

29. The allegations in Paragraph 29 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called.

30. With respect to the allegations in the first sentence of Paragraph 30, Defendants admit that on or about February 23, 2010, Plaintiffs purported to exercise a supposed right to rescind, but deny that Plaintiffs had any such right to exercise. The allegations in the second sentence of Paragraph 30 are incoherent and are accordingly denied.

31. Defendants admit that they received Plaintiffs' purported rescission letter, and that upon review, it was determined that Plaintiffs had no right to rescind.

32. Defendants deny the allegations in Paragraph 32. By way of further statement, Defendants state that Defendant BAC Home Loan Servicing, L.P., timely responded in writing to Plaintiffs' purported rescission notice, denying Plaintiffs' purported exercise of rescission because Plaintiffs had no such right to rescind. Defendants further allege that this letter is in writing and speaks for itself.

33. Defendants deny the allegations in Paragraph 33. By way of further statement, Defendants state

that Defendant BAC Home Loan Servicing, L.P., timely responded in writing to Plaintiffs' purported rescission notice, denying Plaintiffs' purported exercise of rescission because Plaintiffs had no such right to rescind. Defendants further allege that this letter is in writing and speaks for itself.

## VI. Purported Claims for Relief: DEMAND FOR ALLEGED RESCISSION

34. With respect to the allegations in the first sentence of Paragraph 34, Defendants deny that Plaintiffs have any right to rescind and affirmatively allege that Plaintiffs' purported exercise of rescission is invalid and void *ab initio*. The allegations in the second sentence of Paragraph 34 of the Plaintiffs' Amended Complaint consist of purported legal citations to which no response is called. With respect to the allegations in the third sentence of Paragraph 34, Defendants allege that Plaintiffs' purported "offer to tender" is legally insufficient and factually unsupported. By way of further statement, Plaintiffs have alleged no current ability to tender back the full amount of the loan proceeds reflected in the February 23, 2007 Note.

**Count 1:**

**TRUTH IN LENDING ACT, 15 U.S.C. § 1601 *et seq.***

35. With respect to the allegations contained in this section of the Amended Complaint, Defendants repeat and re-allege each and every admission, denial, averment and statement contained in this Answer with the same force and effect as thought set forth here in full.

36. The allegations in Paragraph 36 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called.

37. The allegations in Paragraph 37 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called. To the extent that the allegations in Paragraph 37 purport to characterize the February 23, 2007 Note and Mortgage, Defendants allege that these documents are in writing and speak for themselves, and deny all allegations contrary to or unsupported by these documents.

38. The allegations in Paragraph 38 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called. To the extent that the allegations in Paragraph 38 purport to characterize the February 23, 2007 Note and Mortgage, Defendants allege that these documents are in writing and speak for themselves, and deny all allegations contrary to or unsupported by these documents.

39. The allegations in Paragraph 39 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called. To the extent that the allegations in Paragraph 39 purport to characterize the February 23, 2007 Note and Mortgage, Defendants allege that these documents are in writing and speak for themselves, and deny all allegations contrary to or unsupported by these documents.

40. The allegations in Paragraph 40 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called.

41. The allegations in Paragraph 41 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called. To the extent that the allegations in Paragraph 41 purport to characterize the February 23, 2007 Note and

Mortgage, Defendants allege that these documents are in writing and speak for themselves, and deny all allegations contrary to or unsupported by these documents.

42. The allegations in Paragraph 42 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called. To the extent that the allegations in Paragraph 42 purport to characterize the February 23, 2007 Note and Mortgage, Defendants allege that these documents are in writing and speak for themselves, and deny all allegations contrary to or unsupported by these documents.

43. The allegations in Paragraph 43 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called. To the extent that the allegations in Paragraph 43 purport to characterize the February 23, 2007 Note and Mortgage, Defendants allege that these documents are in writing and speak for themselves, and deny all allegations contrary to or unsupported by these documents.

44. The allegations in Paragraph 44 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called. To the extent that the allegations in Paragraph 44 purport to characterize the February 23, 2007 Note and Mortgage, Defendants allege that these documents are in writing and speak for themselves, and deny all allegations contrary to or unsupported by these documents.

45. The allegations in Paragraph 45 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called. To the extent that the allegations in Paragraph 45 purport

to characterize the February 23, 2007 Note and Mortgage, Defendants allege that these documents are in writing and speak for themselves, and deny all allegations contrary to or unsupported by these documents.

46. The allegations in Paragraph 46 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called.

47. Defendants deny the allegations in Paragraph 47 of the Plaintiffs' Amended Complaint, including all allegations in each of subparagraphs (a), (b), and (c).

48. The allegations in Paragraph 48 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called.

49. Defendants deny the allegations in Paragraph 49 of the Plaintiffs' Amended Complaint.

50. Defendants deny the allegations in Paragraph 50 of the Plaintiffs' Amended Complaint.

51. Defendants deny the allegations in Paragraph 51 of the Plaintiffs' Amended Complaint.

52. Defendants deny the allegations in Paragraph 52 of the Plaintiffs' Amended Complaint.

**Count 2: Purported But Invalid Rescission of Security Interest**

53. With respect to the allegations contained in this section of the Amended Complaint, Defendants repeat and re-allege each and every admission, denial, averment and statement contained in this Answer with the same force and effect as thought set forth here in full.

54. With respect to the allegations in Paragraph 54 of the Plaintiffs' Amended Complaint, Defendants deny that Plaintiffs have any right to rescind, deny

that Plaintiffs are entitled to any equitable relief, and affirmatively allege that Plaintiffs' purported exercise of rescission is invalid and void *ab initio*.

55. With respect to the allegations in Paragraph 55 of the Plaintiffs' Amended Complaint, Defendants deny that Plaintiffs have any right to rescind, deny that Plaintiffs are entitled to any equitable relief, and affirmatively allege that Plaintiffs' purported exercise of rescission is invalid and void *ab initio*.

56. With respect to the allegations in the first sentence of Paragraph 56 of the Plaintiffs' Amended Complaint, Defendants deny that Plaintiffs have any right to rescind, deny that Plaintiffs are entitled to any equitable relief, and affirmatively allege that Plaintiffs' purported exercise of rescission is invalid and void *ab initio*. The allegations in the second sentence of Paragraph 56 are incoherent, and are accordingly denied. By way of further statement, Defendants allege that Plaintiffs' allegation that "no tender obligations has arisen" is admitted because Plaintiffs have no right to rescind and their purported exercise of rescission is invalid. If Plaintiffs hypothetically had a valid right to rescind they would be obligated to immediately tender back the full amount of the loan proceeds provided pursuant to the February 23, 2007 Note. Defendants further allege that Plaintiffs have failed to allege any present ability to tender back these funds.

**Count 3:**

**Servicing a Mortgage Loan in Alleged Violation Of Standards of Conduct**

**Minn. Stat. § 58.13**

57. With respect to the allegations contained in this section of the Amended Complaint, Defendants repeat and re-allege each and every admission,

denial, averment and statement contained in this Answer with the same force and effect as thought set forth here in full.

58. The allegations in Paragraph 58 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called. Defendants further state that Plaintiffs' purport quotation of Minn. Stat. § 58.13 is incomplete and therefore inaccurate.

59. The allegations in Paragraph 59 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called.

60. The allegations in Paragraph 60 of the Plaintiffs' Amended Complaint purport to state a legal conclusion to which no response is called. Defendants further state that Plaintiffs' quotation of Minn. Stat. § 58.13 subd. 1(8) is incomplete and therefore inaccurate.

61. Defendants deny the allegations in Paragraph 61 of Plaintiffs' Amended Complaint.

62. Defendants deny the allegations in Paragraph 62 of Plaintiffs' Amended Complaint, including the allegations in subparagraphs (A), (B), (C), and (D).

**Count 4:**

**Plaintiffs' Purported Cause of Action under Minn. Stat. § 8.31**

63. With respect to the allegations contained in this section of the Amended Complaint, Defendants repeat and re-allege each and every admission, denial, averment and statement contained in this Answer with the same force and effect as thought set forth here in full.

64. Defendants deny the allegations in Paragraph 64 of the Plaintiffs' Complaint.

65. The allegations in Paragraph 65 purport to quote, incompletely, from Minn. Stat. § 58.18 Subd. 2. To the extent that these quotations purport to state a principle of law, Defendants allege that no response to these allegations is required. Defendants further state that because the quotation is incomplete it is out of context and therefore inaccurate. Defendants further state that the present action is not in the public interest.

**VII. Purported Jury Trial Demand:**

Defendants deny that Plaintiffs are entitled to any relief, including a trial by jury.

**VIII. Prayer for Purported Relief:**

Defendants deny all allegations contained in the WHEREFORE clause immediately following Section VII and Paragraph 65 of the Plaintiffs' Amended Complaint. Defendants further deny that Plaintiffs have either alleged a cognizable claim for any such relief, and further deny that Plaintiffs have any ultimate right to such relief on the merits of their putative claims.

**GENERAL DENIAL**

Defendants deny all allegations and/or legal conclusions set forth in the Amended Complaint that have not previously been specifically admitted, denied, or explained.

**AFFIRMATIVE AND OTHER DEFENSES**

Further answering and by way of defense, Defendants state as follows:

1. The Amended Complaint fails to state a claim upon which relief may be granted.

2. Plaintiffs' claims are barred by the doctrines of unclean hands and waiver.

3. The allegations in the Amended Complaint are barred in whole or in part by the documentary evidence.

4. The allegations in the Amended Complaint are barred because Plaintiffs have failed to allege sufficient facts to rebut the presumption of receipt of the mandatory disclosures created by Plaintiffs' signatures acknowledging receipt.

5. Plaintiffs' claims for rescission and all other equitable claims are time-barred under laches and applicable statutes of limitations.

6. Plaintiffs' claims for damages and all other legal claims are time-barred under applicable statutes of limitations.

7. Plaintiffs' claims for rescission are barred by their failure to allege a present ability to tender back all loan proceeds reflected in the February 23, 2007 Note.

**Reservation of Rights to Assert Additional Affirmative Defenses**

Defendants reserve the rights to assert any and all additional affirmative defenses about which Defendants currently have insufficient knowledge or information upon which to form a believe as to whether such defenses are available.

WHEREFORE Defendants deny that Plaintiffs are entitled to any relief, and demand judgment in their favor on all claims and such other relief as the Court deems just and equitable, including costs and fees provided by law.

Dated: August 22, 2011

/s/ Andre Hanson
Ronn B. Kreps (#0151142)
Andre Hanson (#0258234)
Leaf Dilts McGregor (#0389140)
**Fulbright & Jaworski L.L.P.**
2100 IDS Center, 80 S. Eighth Street
Minneapolis, MN 55402-2112
(612) 321-2800
fax: (612) 321-2288
Attorneys for Defendant Countrywide Home Loans, Inc., BAC Home Loans Servicing, and Mortgage Electronic Registration Systems, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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Court File No. 11-CV-474 (DWF/FLN)

LARRY D. JESINOSKI AND CHERYLE JESINOSKI,
INDIVIDUALS,
*Plaintiffs*,

v.

COUNTRYWIDE HOME LOANS, INC.,
D/B/A AMERICA'S WHOLESALE LENDER,
A SUBSIDIARY OF BANK OF AMERICA N.A., ET AL.,
*Defendants*.

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[Filed Oct. 28, 2011]

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**DECLARATION OF ANDRE HANSON**

I, Andre Hanson, declare the following under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am an attorney at Fulbright & Jaworski L.L.P. ("Fulbright") and represent Defendants Bank of America, N.A. (sued herein as Countrywide Home Loans, Inc., d/b/a America's Wholesale Lender and BAC Home Loans Servicing, LP), and Mortgage Electronic Registration Systems, Inc., in this case. I make this declaration in support of the Defendants' Motion for Judgment on the Pleadings with respect to the claims set forth in the Amended Complaint of Plaintiffs Larry D. and Cheryle Jesinoski.

2. Attached hereto as Exhibit A is a true and correct copy of a document obtained from the Jesinoskis' loan file entitled "NOTICE OF RIGHT TO CANCEL,"

dated February 23, 2007, and bearing the signatures of Mr. and Ms. Jesinoski.

3. Attached hereto as Exhibit B is a true and correct copy of a document obtained from the Jesinoskis' loan file entitled "TRUTH IN LENDING DISCLOSURE STATEMENT," dated February 23, 2007, and bearing the signatures of Mr. and Ms. Jesinoski.

FURTHER DECLARANT SAYETH NOT.

Dated: October 28, 2011

*/s/ Andre Hanson*
Andre Hanson

## NOTICE OF RIGHT TO CANCEL

**RESCISSION-DIFFERENT LENDER**
**REFINANCE**

Prepared by: AMANDA BUNDELL

**AMERICA'S WHOLESALE LENDER**

DATE: 02/22/2007
BORROWER: LARRY D. JESINOSKI
CASE #:
LOAN #: 159328556
PROPERTY ADDRESS: 4165 CASKELL GLEN
EAGAN, MN 55122

Branch #: 0000989
1907 E WAYZATA BLVD #200
WAYZATA, MN 55391
Phone: (952)404-6500
Br Fax No.: (N)

58

### YOUR RIGHT TO CANCEL

You are entering into a transaction that will result in a mortgage/lien/security interest on/in your home. You have a legal right under federal law to cancel this transaction, without cost, within THREE BUSINESS DAYS from whichever of the following events occurs last:

(1) The date of the transaction, which is 02/23/2007 ; or
(2) The date you received your Truth in Lending disclosures; or
(3) The date you received this notice of your right to cancel.

If you cancel the transaction, the mortgage/lien/security interest is also cancelled. Within 20 CALENDAR DAYS after we receive your notice, we must take the steps necessary to reflect the fact that the mortgage/lien/security interest on/in your home has been cancelled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 CALENDAR DAYS of your offer, you may keep it without further obligation.

### HOW TO CANCEL

If you decide to cancel this transaction, you may do so by notifying us in writing, at:

AMERICA'S WHOLESALE LENDER
1907 E WAYZATA BLVD #200
WAYZATA, MN 55391

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than MIDNIGHT of 02/27/2007 (or MIDNIGHT of the THIRD BUSINESS DAY following the latest of the three events listed above.) If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

### I WISH TO CANCEL

SIGNATURE _____ DATE _____

The undersigned each acknowledge receipt of two copies of NOTICE of RIGHT TO CANCEL and one copy of the Federal Truth in Lending Disclosure Statement.

Each borrower/owner in this transaction has the right to cancel. The exercise of this right by one borrower/owner shall be effective to all borrowers/owners.

BORROWER/OWNER 2/23/07 DATE
LARRY D. JESINOSKI

BORROWER/OWNER 2/23/07 DATE
CHERYLE L. JESINOSKI

BORROWER/OWNER DATE

BORROWER/OWNER DATE

-64 (0210).ai CHL (04/03)(d) VMP MORTGAGE FORMS - (800)521-7291 10/00

*23881*

*1893285800000002064-*

Prepared by: AMANDA BUNDELL

# TRUTH IN LENDING DISCLOSURE STATEMENT
(THIS IS NEITHER A CONTRACT NOR A COMMITMENT TO LEND)

LENDER: AMERICA'S WHOLESALE LENDER

4500 Park Granada
Calabasas, CA 91302-1613

☐ Preliminary ☒ Final
DATE 02/23/2007

BORROWERS: LARRY D JESINOSKI

LOAN / CASE NO. 159328556

Type of Loan: CONV UNINSURED NC ARM LIBR 5/1 EC 10yIO 525

ADDRESS: 4165 CASHELL GLEN
CITY STATE / ZIP: EAGAN, MN 55122
PROPERTY: 4165 CASHELL GLEN EAGAN, MN 55122

| ANNUAL PERCENTAGE RATE<br>The cost of your credit as a yearly rate. | FINANCE CHARGE<br>The dollar amount the credit will cost you. | Amount Financed<br>The amount of credit provided to you or on your behalf. | Total of Payments<br>The amount you will have paid after you have made all payments as scheduled. |
|---|---|---|---|
| 7.179 % | $ 1,010,896.36 | $ 605,540.38 | $ 1,616,436.74 |

PAYMENT SCHEDULE:

| NUMBER OF PAYMENTS | AMOUNT OF PAYMENTS | WHEN PAYMENTS ARE DUE |
|---|---|---|
| 60 | 3,182.29 | MONTHLY BEGINNING 04/01/2007 |
| 60 | 3,882.40 | MONTHLY BEGINNING 04/01/2012 |
| 239 | 4,968.98 | MONTHLY BEGINNING 04/01/2017 |
| 1 | 4,969.12 | LAST PAYMENT DUE 03/01/2037 |

DEMAND FEATURE: ☒ This loan does not have a Demand Feature. ☐ This loan has a Demand Feature as follows:

VARIABLE RATE FEATURE:
☒ This loan has a Variable Rate Feature. Variable Rate Disclosures have been provided to you earlier.

SECURITY: You are giving a security interest in the property located at:
4165 CASHELL GLEN, EAGAN, MN 55122

ASSUMPTION: Someone buying this property ☐ cannot assume the remaining balance due under original mortgage terms
☒ may assume, subject to lender's conditions, the remaining balance due under original mortgage terms.

PROPERTY INSURANCE: Hazard insurance, including flood insurance if the property is in a Special Flood Hazard Area, is required as a condition of this loan. You may obtain the insurance coverage from any insurance company acceptable to the lender. Complete details concerning insurance requirements will be provided prior to loan closing.

LATE CHARGES: If your payment is more than 15 days late, you will be charged a late charge of 5.000% of the overdue payment.

PREPAYMENT: If you pay off your loan early, you
☐ may ☒ will not be entitled to a refund of part of the finance charge.
☐ may ☒ will not have to pay a penalty.

See your contract documents for any additional information regarding non-payment, default, required repayment in full before scheduled date, and prepayment refunds and penalties.

We [illegible] acknowledge receipt and receiving a complete copy of this disclosure.

BORROWER LARRY D JESINOSKI — DATE 2/23/07
BORROWER CHERYLA L JESINOSKI — DATE 2/23/07
BORROWER — DATE
BORROWER — DATE

FHAVAOOHV
© Truth In Lending Disclosure
[illegible]



[redacted] [redacted]

**Supreme Court of the United States**
**Office of the Clerk**
**Washington, DC 20543-0001**

SCOTT S. HARRIS
Clerk of the Court
(202) 479-3011

April 28, 2014

Mr. David C. Frederick
Kellogg, Huber, Hansen, Todd,
Evans & Figel, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036

Re: Larry D. Jesinoski, et ux.
v. Countrywide Home Loans, Inc., et al.
No. 13-684

Dear Mr. Frederick:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted.

Sincerely,

/s/ SCOTT S. HARRIS

**Scott S. Harris**, Clerk

# PETITIONER'S BRIEF

RECORD AND BRIEFS

No. 13-684

Supreme Court, U.S.
FILED
JUL 15 2014
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

LARRY D. JESINOSKI AND CHERYLE JESINOSKI, INDIVIDUALS,
*Petitioners*,

v.

COUNTRYWIDE HOME LOANS, INC., SUBSIDIARY OF BANK OF AMERICA N.A., D/B/A AMERICA'S WHOLESALE LENDER, ET AL.,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF FOR PETITIONERS

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July 15, 2014

Library of Congress
Law Library

## QUESTION PRESENTED

The Truth in Lending Act provides that a borrower "shall have the right to rescind the transaction until midnight of the third business day following . . . the delivery of the information and rescission forms required under this section . . . by notifying the creditor . . . of his intention to do so." 15 U.S.C. § 1635(a). The statute further creates a "[t]ime limit for [the] exercise of [this] right," providing that the borrower's "right of rescission shall expire three years after the date of consummation of the transaction" even if the "disclosures required . . . have not been delivered." *Id.* § 1635(f).

The question presented is:

Does a borrower exercise his right to rescind a transaction in satisfaction of the requirements of Section 1635 by "notifying the creditor" in writing within three years of the consummation of the transaction, or must a borrower file a lawsuit within three years of the consummation of the transaction?

## PARTIES TO THE PROCEEDINGS

Petitioners Larry D. Jesinoski and Cheryle Jesinoski were the plaintiffs and the appellants in the proceedings below.

Respondents Countrywide Home Loans, Inc., a subsidiary of Bank of America N.A., d/b/a America's Wholesale Lender; BAC Home Loans Servicing, LP, a subsidiary of Bank of America, N.A., a Texas Limited Partnership, formerly known as Countrywide Home Loans Servicing, L.P.; Mortgage Electronic Registration Systems, Inc., a Delaware Corporation; and John and Jane Does 1-10 were the defendants and the appellees in the proceedings below.

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## INTRODUCTION

The Truth in Lending Act provides the right to rescind certain home mortgages to promote the informed and efficient use of credit. The statute requires creditors to disclose to borrowers the material terms of the credit offered. Congress mandated meaningful disclosure to allow borrowers to compare credit terms and to make informed credit choices. It then created the right to rescind the transaction as an opportunity for the borrower to consider carefully the credit terms offered and to make a deliberate, informed choice about whether to accept them. To provide that opportunity in light of the disclosures required by the statute, the right to rescind extends for three days after the loan is consummated, or for three days after the mandatory disclosures are provided to the borrower, whichever is later. That right expires three years after the loan is consummated, even if the creditor never provides the mandatory disclosures.

This case raises the question whether a borrower must file a lawsuit to rescind the mortgage. Under the plain language of the statute, the answer is no. Congress used the word "notify" as the method for a borrower's exercise of the statutory right of rescission. Under that term's plain meaning and the longstanding construction by the agencies charged with administering the statute, the borrower must provide only written notice to the lender. The statute does not require the filing of a lawsuit.

The contrary interpretation accepted by the courts below and espoused by respondents rests on a strained construction of the concept of notice and necessitates adding words Congress did not include in the statute. It also thwarts the statutory purpose

of providing a non-judicial mechanism for borrowers who do not receive the statutorily required disclosures to rescind the mortgage, subject to carefully scripted procedures that return parties to their pre-transaction position.

Under the ordinary meaning of the terms that Congress used, petitioners exercised their rescission right when they provided written notice within three years of the transaction. When respondents denied the grounds for the rescission and refused to take the actions required by the statute within the 20-day statutory period, petitioners' claim accrued and they brought suit for declaratory relief within one year of respondents' default. By upholding the dismissal of petitioners' lawsuit as untimely, therefore, the court below erred.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-3a) is reported at 729 F.3d 1092. The opinion of the district court (App. 4a-9a) is not reported (but is available at 2012 WL 1365751).

## JURISDICTION

The court of appeals entered its judgment on September 10, 2013, and denied a petition for rehearing on November 13, 2013 (App. 10a-11a). The petition for a writ of certiorari was filed on December 6, 2013, and granted on April 28, 2014 (JA60). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, and of the Federal Reserve Board's Regulation Z are reproduced both at App. 12a-19a and in the addendum to this brief.

## STATEMENT

### A. Statutory Background

"Passage of the Truth in Lending Act in 1968 culminated several years of congressional study and debate as to the propriety and usefulness of imposing mandatory disclosure requirements on those who extend credit to consumers in the American market." *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 363 (1973). Congressional hearings leading to the passage of the statute revealed that, "[b]ecause of the divergent, and at times fraudulent," lending practices, "many consumers were prevented from shopping for the best terms available and, at times, were prompted to assume liabilities they could not meet." *Id.* (citing H.R. Rep. No. 90-1040, at 13 (1967); S. Rep. No. 90-392, at 1-2 (1967)). Practices resulting in the uninformed and inefficient use of credit included "vicious secondary mortgage schemes" that "victimized" and "defrauded" homeowners. 114 Cong. Rec. 1611 (1968) (statement of Rep. Cahill). Expert testimony confirmed that "such blind economic activity is inconsistent with the efficient functioning of a free economic system such as ours." *Mourning*, 411 U.S. at 363-64 (citing *Hearings on H.R. 11601 Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking and Currency*, 90th Cong., pt. 1, at 76 (1967)).

The Truth in Lending Act "was designed to remedy the[se] problems." *Id.* at 364. Congress found that "economic stabilization would be enhanced and the competition among various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit." 15 U.S.C. § 1601(a). It stated that "[t]he informed use of credit results from an awareness of

the cost thereof by consumers." *Id.* The statute sought "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." *Id.* In particular, the statute requires creditors to disclose to borrowers certain material terms of a mortgage, including "finance charges, annual percentage rates of interest, and the borrower's rights." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998) (citing 15 U.S.C. §§ 1631, 1632, 1635, 1638).

Section 1635(a)[1] provides that certain borrowers who secure a loan with their "principal dwelling" "shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section . . . , whichever is later, by notifying the creditor . . . of his intention to do so." 15 U.S.C. § 1635(a); *see also id.* § 1635(e) (exempting certain mortgages from Section 1635(a)). Section 1635(a) thereby creates an unconditional right to rescind for three days after the consummation of the transaction and, if the creditor fails to provide the disclosures required by the statute, extends that right to rescind until three days following the ultimate delivery of that information. The statute thus allows the borrower to rescind for at least three days after receiving the disclosures.

A borrower's exercise of the right to rescind sets in motion a series of automatic steps to unwind the

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[1] This brief refers to the section numbers in Title 15 of the United States Code, which is the convention used by this Court in *Beach*, rather than to the section numbers in the enacted version of the Truth in Lending Act.

transaction, imposing obligations on both the creditor and the borrower. Section 1635(b) provides that, when a borrower "exercises his right to rescind under [Section 1635(a)], he is not liable for any finance or other charge, and any security interest given by the [borrower] . . . becomes void upon such a rescission." *Id.* § 1635(b). It next provides that, "[w]ithin 20 days after receipt of a notice of rescission, the creditor shall return to the [borrower] any money or property given as . . . downpayment . . . and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." *Id.* Subsequently, "[u]pon the performance of the creditor's obligations under this section, the [borrower] shall tender the property to the creditor," but, "[i]f the creditor does not take possession of the property within 20 days after tender by the [borrower], ownership of the property vests in the [borrower] without obligation on his part to pay for it." *Id.* These "procedures prescribed" by Section 1635(b) "shall apply except when otherwise ordered by a court." *Id.*

As originally enacted, the right to rescind never expired, extending the three-day rescission right until the creditor delivered proper disclosures, whenever that might be. In 1974, Congress amended the statute to impose a three-year limit on the right to rescind even if a creditor never delivers the disclosures required by the statute. *See* Act of Oct. 28, 1974, Pub. L. No. 93-495, § 405, 88 Stat. 1500, 1517 (codified as amended at 15 U.S.C. § 1635(f)). Section 1635(f) thus provides that a borrower's "right of rescission shall expire three years after the date of consummation of the transaction . . . notwithstanding the fact that the information . . . required under this

section or any other disclosures required under [the Act] have not been delivered to the [borrower]." 15 U.S.C. § 1635(f).

**B. Regulatory Background**

The Act delegated to the Federal Reserve Board "broad authority to promulgate regulations necessary to render the Act effective." *Mourning*, 411 U.S. at 365; *see* Truth in Lending Act, Pub. L. No. 90-321, tit. I, §§ 103(b), 105, 82 Stat. 146, 147, 148 (1968). The statute further provided that "[t]hese regulations may contain such classifications, differentiations, or other provisions . . . as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith." *Id.* § 105, 82 Stat. 148. Section 1635(a) itself provides that "the [borrower] shall have the right to rescind the transaction . . . by notifying the creditor, *in accordance with regulations of the Board*, of his intention to do so." *Id.* § 125(a), 82 Stat. 152 (codified as amended at 15 U.S.C. § 1635(a)) (emphasis added).

In 1969, the Board promulgated the requisite implementing regulations (which became known as "Regulation Z") after a notice-and-comment process that included consultation with an advisory panel of "representatives of diverse retail, lending, and consumer groups." *Mourning*, 411 U.S. at 368. Regulation Z states that, "[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication." 12 C.F.R. § 226.23(a)(2).

The regulations mandate that the creditor deliver the required disclosures to every person who has an ownership interest in the property, each of whom has the right to rescind. *See id.* § 226.23(a)(1) ("each

consumer whose ownership interest is . . . subject to the security interest shall have the right to rescind"); *id.* § 226.23(b)(1) ("a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind"); *id.* § 226.17(d) ("If the transaction is rescindable . . . , the disclosures shall be made to each consumer who has the right to rescind."). This requirement ensures that every owner of the property is informed of the transaction's terms and of the right to rescind. *See* Official Commentary to 12 C.F.R. § 1026.23(b)(1) ("In a transaction involving joint owners, both of whom are entitled to rescind, both must receive the notice of the right to rescind and disclosures. For example, if both spouses are entitled to rescind a transaction, each must receive two copies of the rescission notice . . . and one copy of the disclosures."), *available at* http://www.consumerfinance.gov/eregulations/1026-23/2013-30108_20140118#1026-23-b-1-ii. The regulations thus protect the interests of both spouses should they divorce or choose for any reason not to act jointly with respect to the property.

In the past decade, Congress again confronted "the prevalence of unsound lending practices, including predatory lending tactics" that it had first addressed a generation before. S. Rep. No. 111-176, at 43 (2010). In 2010, Congress responded to the financial crisis with the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The Dodd-Frank Act aimed "to protect consumers from abusive financial services practices" including predatory mortgage lending. *Id.*, Preamble, 124 Stat. 1376. The Dodd-Frank Act created the Consumer Financial Protection Bureau, to which Congress transferred regulatory authority

over the Truth in Lending Act, using the same broad terms of delegation. *See* Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, tit. X § 1061(b)(1), (d), 124 Stat. 1376, 1955, 2036, 2039 (codified at 12 U.S.C. § 5581(b)(1), (d)). Under that authority, in 2011 the Bureau re-promulgated Regulation Z without changing the rescission provision. *See* Interim Final Rule, Truth in Lending (Regulation Z), 76 Fed. Reg. 79,768, 79,803-04 (Dec. 22, 2011) (promulgated at 12 C.F.R. § 1026.23); Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 79,730, 79,850 (Dec. 31, 2013) ("[t]he Bureau declines to . . . amend the rescission rules)" (citing 15 U.S.C. § 1635(a)).

**C. Factual Background**

On February 23, 2007, petitioners Larry and Cheryle Jesinoski refinanced the mortgage on their primary residence in Eagan, Minnesota, by executing a promissory note for $611,000 with Countrywide Home Loans, Inc. App. 5a.[2] At the closing of the transaction, the creditor failed to provide two copies of a Notice of Right to Cancel for each of the Jesinoskis and two copies of a Truth in Lending Disclosure Statement, as required by the statute. *See* JA29 (Am. Compl. ¶¶ 19-20). The creditors never delivered the required disclosures. App. 5a.

On February 23, 2010, within the three-year limitation period set by Section 1635(f), the Jesinoskis

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[2] Because petitioners' case was dismissed on the pleadings, this background provides the First Amended Complaint's pleaded facts, which at this stage of the case are assumed to be true. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 (2007).

exercised their right to rescind the transaction by sending written notice of rescission to respondents. *Id.*; *see* Add. 9-10. On March 12, 2010, respondent Bank of America Home Loans replied to the Jesinoskis' notice of rescission by refusing to acknowledge the rescission. App. 5a. No other interested party responded to the Jesinoskis' notice of rescission. *See* JA30 (Am. Compl. ¶ 33). The creditors subsequently failed to take, within 20 days of receipt of the notice of rescission, any of the steps required by Section 1635(b) to return the money paid by the Jesinoskis or to reflect the termination of the security interest in the Jesinoskis' home. *See id.* (Am. Compl. ¶ 31).

**D. Proceedings Below**

On February 24, 2011, the Jesinoskis filed a complaint in the United States District Court for the District of Minnesota seeking to enforce the rescission they had exercised one year earlier. App. 5a-6a. Their amended complaint, filed on July 22, 2011, sought a declaration that the mortgage transaction had been rescinded by their written notice dated February 23, 2010; damages under Section 1640 for respondents' violations of the statute; and damages under state-law causes of action arising from violations of federal mortgage regulatory law. App. 6a. Respondents answered and moved for judgment on the pleadings on the ground that the Jesinoskis' suit was barred because the complaint was filed more than three years after the consummation of the transaction. App. 7a-9a.

The district court granted respondents' motion. App. 9a. The court held that "a suit for rescission filed more than three years after consummation of an eligible transaction is barred by [the Act's] statute of

repose" in Section 1635(f). *Id.* Because "there is no dispute that [the Jesinoskis] failed to file suit within the three-year period," the court held that "their claims are time-barred." *Id.*

The Jesinoskis appealed to the Eighth Circuit, which affirmed the district court's judgment. The per curiam opinion noted that the Eighth Circuit "recently weighed in on the circuit split regarding this precise issue and held that a party seeking to rescind a loan transaction must file suit within three years of consummating the loan." App. 2a (citing *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 726-29 (8th Cir. 2013), *petition for cert. pending*, No. 13-705 (U.S. filed Dec. 9, 2013)). On that ground alone, the court of appeals "affirm[ed] the district court's judgment on the pleadings in favor of the lenders." *Id.*

Two members of the panel each concurred separately to express their views that the Eighth Circuit's precedent compelled the wrong result. Judge Melloy wrote that, "[w]ere we writing on a clean slate, . . . I would hold . . . that sending notice within three years of consummating a loan is sufficient to 'exercise' the right to rescind." App. 2a-3a (Melloy, J., concurring in the judgment) (citing 12 C.F.R. § 1026.23(a)(2)). Judge Colloton wrote that he "believe[s] that *Keiran* . . . was wrongly decided . . . and I would reverse the judgment of the district court if the question presented were open in this circuit." App. 3a (Colloton, J., concurring).

The Jesinoskis petitioned for rehearing en banc, which the Eighth Circuit denied by a vote of 6 to 4. App. 10a.

## SUMMARY OF ARGUMENT

**I.A.** Section 1635(a) of Title 15 both creates the right to rescind and specifies the method of its exercise: "by notifying the creditor." The ordinary meaning of this phrase is that the borrower must inform the creditor that the borrower rescinds the mortgage contract. Every dictionary definition of "notify" confirms that ordinary meaning and none mentions a lawsuit. In accord with that ordinary meaning, Congress consistently used "notify" and "notice" elsewhere in the statute to mean "inform." There is thus no textual basis in the statute to impose an unstated requirement that the borrower file a lawsuit to exercise the right to rescind.

**B.** The structure of the statute confirms that there is no requirement to file suit to exercise the right to rescind. Section 1635(a) creates a single right to rescind that may be exercised within three days of either the consummation of the transaction or the delivery of the required disclosures. Even respondents do not take the position that the statute requires a borrower to file a lawsuit within three days of the transaction. Yet it is untenable to interpret the statute to require different methods of exercising the right when the statute specifies the method by a single instance of the phrase "by notifying the creditor." Section 1635(b), in turn, establishes carefully scripted procedures to unwind the transaction that explicitly do not require the involvement of a court and therefore no lawsuit is required to initiate them. Finally, Section 1635(f) limits the life of the right to rescind not by imposing a statute of limitations on filing suit but by providing that the right "shall expire" three years after the consummation of the transaction. This manner of limiting the

duration of the right demonstrates that no lawsuit is required to exercise it.

**C.** The statutory and legislative history of Section 1635 provide further confirmation that notifying the creditor is sufficient to exercise the right to rescind. Congress actively engaged with the statute in the years after its original enactment, amending it multiple times without altering the method to exercise the right to rescind. Tellingly, Congress considered and rejected an amendment in 1977 to create a cause of action "to determine the consumer's right to rescind." Congress's action took place against the backdrop of the Federal Reserve Board's interpretation of Section 1635(a) to require only written notice to exercise the right to rescind. The subsequent statutory history thus demonstrates that Congress understood that Section 1635(a) did not require a lawsuit and that it acquiesced to the Board's interpretation.

The legislative debates preceding the original enactment of the statute further illuminate Congress's intent to create a simple, non-judicial remedy. Both statements by the sponsoring members of Congress and the conference report evince the intent that notice alone be sufficient to exercise the "vitally important" right Congress created to give the statute's disclosure requirements "real teeth."

**D.** The text, structure, and history of Section 1635 manifest its purpose to create a non-judicial right of rescission. In creating the right to rescind, Congress meant to provide a simple mechanism for borrowers to reconsider their credit decision for three days after they receive all the disclosures required by the statute. To that end, Congress codified core components of the longstanding common-law remedy

of rescission. At common law, a party effectuates a rescission simply by notifying the non-rescinding party. A lawsuit for restitution is required only if the non-rescinding party refuses to tender what must be returned under the rescission that had been accomplished by notice. In codifying that well-established common-law remedy, Congress achieved the statute's remedial purpose to promote the informed and efficient use of credit.

A requirement to file suit would frustrate Congress's purpose by manufacturing thousands of needless lawsuits from a statute it passed to protect borrowers without resorting to burdensome litigation. Moreover, such a requirement is not necessary to prevent "uncertainty" regarding title because notice informs a creditor that the right has been exercised just as readily as does a lawsuit, and any dispute about the validity of the exercise of the right may be resolved promptly.

**II.** The Federal Reserve Board and now the Consumer Financial Protection Bureau have long interpreted Section 1635 to require only that the borrower notify the creditor in writing to exercise the right to rescind. The Bureau has confirmed in *amicus* briefs before the courts of appeals that neither the statute nor the regulation imposes a further, unstated requirement to file suit. These interpretations by the agencies charged by Congress with implementing the statute warrant this Court's deference.

**III.** Section 1635(f) provides only that the right to rescind "shall expire" after three years and in no way alters the manner in which that right may be exercised. The text, history, and purpose of Section 1635(f) demonstrate that it was enacted to address the specific problem of *unexercised* rights of rescis-

sion that could create uncertainty. This Court's decision in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), confirms that Section 1635(f) was narrowly targeted to prevent the exercise of the right after three years, not to impose a requirement to file suit within three years. Because petitioners notified their creditors within three years of the consummation of the transaction of their intention to rescind, their exercise of the right was timely. Because petitioners' subsequent lawsuit to enforce their exercise of the right was filed within any possible statute of limitations that might apply, their lawsuit was timely.

## ARGUMENT

### I. A BORROWER EXERCISES THE RIGHT TO RESCIND UNDER SECTION 1635(a) BY NOTIFYING THE CREDITOR OF THE INTENTION TO DO SO

The plain text of Section 1635(a), as well as the statute's structure, statutory and legislative history, and purpose, demonstrate that "notifying the creditor" is sufficient to exercise the right to rescind and that there is no further requirement to file suit. Congress's actions in the 45 years since Regulation Z was first promulgated confirm its endorsement of the agency's interpretation of the statute.

#### A. The Plain Text Of Section 1635(a) Establishes That Notifying The Creditor Is Sufficient To Exercise The Right To Rescind

The text of Section 1635(a) is clear: a borrower exercises "the right to rescind . . . by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so." 15 U.S.C. § 1635(a). The Court "begin[s] with the Act's language." *United States v. Tinklenberg*, 131 S. Ct. 2007, 2012 (2011). "[W]here, as here, the statute's language is plain, 'the

sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, . . . 'judicial inquiry is complete.'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (internal quotation marks omitted). The ordinary meaning of the phrase "notifying the creditor," confirmed by Congress's consistent usage across the statute, requires only that the borrower inform the creditor of the intention to rescind the transaction and entails no further requirement that the borrower file a lawsuit.

1. Dictionaries contemporaneous to the enactment of Section 1635(a) establish that the ordinary meaning of "notifying the creditor" is to inform the creditor.[3] Those dictionaries define the verb "to notify" to mean "to give notice," "to make known," or "to inform." *See Webster's New International Dictionary* 1669 (2d ed. 1952) ("*Webster's Second*") (defining "notify" as "[t]o give notice of; to make known; to declare; to publish"); *Webster's Third New International Dictionary* 1545 (1961) ("*Webster's Third*") (defining "notify" as "to point out: INDICATE,

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[3] Because the statute does not define the term "notifying," the Court may look to contemporaneous dictionaries for its meaning. *See, e.g., Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2003 (2012) (relying on "survey of the relevant dictionaries" to establish "ordinary or common meaning" of statutory term).

DENOTE" and "to give notice of : make known : DECLARE, PUBLISH"); *American Heritage Dictionary of the English Language* 897 (1st ed. 1969) ("*American Heritage*") (defining "notify" as "[t]o give notice to (someone); inform"). Those dictionaries in turn define "notice" to mean "information," "warning," or "announcement." *See Webster's Second* 1669 (defining "notice" as "[i]nformation; intimation or warning, esp. of a formal nature; announcement"); *Webster's Third* 1544 (defining "notice" as "formal or informal warning or intimation of something: ANNOUNCEMENT"); *American Heritage* 897 (defining "notice" as "[a]ny announcement, information, or indication of some present or coming event").

Legal dictionaries corroborate these ordinary meanings of "notify" and "notice." *See, e.g., Black's Law Dictionary* 1211-12 (4th ed. 1968) ("*Black's*") (defining "notify" as "[t]o give notice to; to inform by words or writing, in person or by message, or by any signs which are understood; to make known"); *id.* at 1210 (defining "notice" as "[i]nformation; the result of observation, whether by the senses or the mind; knowledge of the existence of a fact or state of affairs; the means of knowledge"). None of these dictionaries mentions filing a lawsuit in defining "notify" or "notice."

**2.** The ordinary meaning of the phrase "notifying the creditor" is confirmed by the statute's consistent usage of the terms "notify" and "notice" to refer to providing information. "[T]he normal rule of statutory interpretation" is "that identical words used in different parts of the same statute are generally presumed to have the same meaning." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005); *see also United States v. Castleman*, 134 S. Ct. 1405, 1417 (2014)

(Scalia, J., concurring in part and concurring in the judgment) ("presumption of consistent usage" assumes that "a term generally means the same thing each time it is used"). Section 1640(b) provides that creditors are not to be liable for certain violations of the statute if, within 60 days after discovering the error and "prior to the institution of *an action* under this section or the receipt of written *notice* of the error from the [borrower], the creditor . . . *notifies* the person concerned of the error." 15 U.S.C. § 1640(b) (emphases added). This provision explicitly distinguishes between "the institution of an action," which plainly refers to a lawsuit, and "written notice" and "notifies," which refer to providing information. Similarly, Section 1641(g)(1) requires creditors who are new assignees of a mortgage to "notify the borrower in writing" within 30 days of the assignment. *Id.* § 1641(g)(1). Neither of these provisions requires the creditor to file a lawsuit, thereby confirming that Congress used the verb "notify" solely to mean to inform.

The statute's use of the word "notice" further establishes Congress's intent to employ the ordinary meaning of "notify." Section 1638a(b) requires creditors or servicers of certain mortgages to provide "written notice" before an interest rate change. *Id.* § 1638a(b). Congress demonstrated that this notice requirement does not entail a lawsuit by specifying that the notice shall be "separate and distinct from all other correspondence to the consumer." *Id.* Likewise, the originally enacted version of Section 1637(c) provided that certain information regarding "open end consumer credit plan[s] . . . shall be disclosed in a *notice* mailed or delivered to the [borrower] not later than thirty days after that date." Pub.

L. No. 90-321, § 127(c), 82 Stat. 155 (emphasis added). In neither provision can "notice" plausibly refer to a lawsuit because in both "notice" is sent or received to communicate information. Consequently, in Section 1635(a), "notifying the creditor" must refer to informing the creditor.

3. From its plain meaning and the ways "notify" and "notice" are used in adjoining provisions of the statute, the conclusion is inescapable that the phrase "notifying the creditor" in Section 1635(a) refers to providing information. Nothing in the statutory text supports the notion that a borrower must file suit to exercise the right to rescind. *See Bates v. United States*, 522 U.S. 23, 29 (1997) (the Court will "ordinarily resist reading words or elements into a statute that do not appear on its face"). The unambiguously plain meaning of Section 1635(a), therefore, is that a borrower exercises the right to rescind by informing the creditor and that the filing of a lawsuit is not necessary to effectuate a rescission.

### B. The Statute's Structure Confirms That A Borrower Exercises The Right To Rescind By Notifying The Creditor Of The Intention To Do So

The statute's structure confirms that Section 1635(a)'s plain meaning requires the borrower only to "notify the creditor" to exercise the right to rescind with no further requirement to file suit. Statutes "should not be read as a series of unrelated and isolated provisions." *Gonzales v. Oregon*, 546 U.S. 243, 273 (2006) (internal quotation marks omitted). Rather, a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."

*Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (internal quotation marks omitted).

1. Section 1635(a)'s structure itself confirms that notice is sufficient to exercise the right to rescind. Section 1635(a) establishes the method for exercising the right to rescind either within three days after the consummation of the loan (if all required disclosures are provided by that time) or within three days after the delivery of the required disclosures and rescission forms (if the creditor failed to provide them when the loan was made). It establishes that right, applicable in both circumstances, in a single sentence using a single instance of the phrase "by notifying the creditor." *See* 15 U.S.C. § 1635(a).

Reading Section 1635(a) as requiring only notice during that initial three-day period following the transaction but dictating the filing of a lawsuit during the three-day period following the subsequent and ultimate delivery of the required disclosures is untenable. *See* Resp. Cert. Br. 24-25. Because both notification provisions are the exercise of a single right created by the very same words of the very same sentence, respondents' approach necessitates adding textual requirements that Congress did not include. *See Burwell v. Hobby Lobby Stores, Inc.*, Nos. 13-354 & 13-356, slip op. 20 (U.S. June 30, 2014) ("'To give th[e] same words a different meaning for each category would be to invent a statute rather than interpret one.'") (quoting *Clark v. Martinez*, 543 U.S. 371, 378 (2005)) (alteration in original).

The final sentence of Section 1635(a) further verifies that a borrower exercises the right to rescind simply by informing the creditor. That sentence states that "[t]he creditor shall . . . provide . . . appropriate forms for the [borrower] to exercise his right to

rescind." 15 U.S.C. § 1635(a). That provision plainly requires the creditor to supply forms by which the borrower can notify the creditor, thereby "exercis[ing] his right to rescind." Such forms would not aid the borrower "to exercise his right to rescind" if doing so required filing a lawsuit. The structure of Section 1635(a) therefore confirms the ordinary meaning of its text that a borrower exercises the right to rescind by informing the creditor.

2. The detailed and time-sensitive procedures that Congress carefully scripted in Section 1635(b) for unwinding the transaction after the borrower exercises the rescission right support the conclusion that Congress intended the right to be exercised by notice, not by the filing of a lawsuit. Section 1635(b) provides that, "[w]hen [a borrower] exercises his right to rescind under [Section 1635(a)], he is not liable for any finance or other charge, and any security interest given by the [borrower] . . . becomes void upon such a rescission." 15 U.S.C. § 1635(b). The creditor's obligations under Section 1635(b) are expressly triggered by the "receipt of a notice of rescission," *id.*, confirming that informing the creditor is sufficient to exercise the right to rescind. "Within 20 days" of receiving that notice, the creditor "*shall* return" money or property given by the borrower and "*shall* take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." *Id.* (emphases added). Section 1635(b) sets forth that process without mentioning litigation or the involvement of a court.

Moreover, the procedures of Section 1635(b) governing rescissions under Section 1635(a) are affirmatively inconsistent with the litigation process. The

20-day time limit for the creditor to return the borrower's money or property and take action to reflect the termination of the security interest leaves no room for the deliberate pleading schedule of the civil justice system. *See* Fed. R. Civ. P. 12(a) (establishing times for responsive pleadings). Indeed, Section 1635(b) demonstrates that the rescission process ordinarily proceeds without judicial intervention by providing that "[t]he procedures prescribed by this subsection *shall apply* except when otherwise ordered by a court." 15 U.S.C. § 1635(b) (emphasis added). Accordingly, because no action by a court is required to unwind the transaction, no lawsuit is required to exercise the right to rescind.

3. Congress confirmed it understood that exercising the right to rescind did not require filing a lawsuit when it enacted the time limit in Section 1635(f). It imposed a three-year limit on the right to rescind not by means of a statute of limitations but rather by providing that the right would "expire." 15 U.S.C. § 1635(f). By its terms, that three-year "[t]ime limit" terminates the "right of rescission" without mentioning a lawsuit. *Id.*; *see Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416-17 (1998) (explaining that Section 1635(f) "says nothing in terms of bringing an action" and "talks not of a suit's commencement but of a right's duration"). In stark contrast, Section 1640(e) expressly imposes a statute of limitations on the statute's cause of action for damages. *Compare* 15 U.S.C. § 1635(f) ("[A borrower's] right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first . . . .") *with id.* § 1640(e) ("[A]ny action under this section may be brought . . . within one year from the date

of the occurrence of the violation . . . ."). These "unmistakably different treatments" in different provisions of the statute "reflect a deliberate intent on the part of Congress." *Beach*, 523 U.S. at 418. Accordingly, Congress's decision not to impose a statute of limitations in Section 1635(f) confirms that a lawsuit is not required to exercise the right to rescind in Section 1635(a).

4. Finally, Congress's intent that the right to rescind be exercised by notice alone may be gleaned inferentially from its express creation of a damages action in Section 1640. Although in Section 1635(a) Congress expressly provided that notification would be sufficient to trigger rescission, it set forth in Section 1640 a more complex set of requirements for a lawsuit alleging damages. Section 1640 creates a cause of action, establishes venue, sets out statutory damages, and creates a statute of limitations for civil actions for damages alleging violations of the statute. *See* 15 U.S.C. § 1640(a) (setting statutory damages for "any creditor who fails to comply with any requirement imposed under this part"); *id.* § 1640(e) ("any action under this section may be brought . . . within one year from the date of the occurrence of the violation"). By expressly creating a cause of action for damages, Congress plainly knew how to require litigation when it wanted to. Its deliberate decision not to impose such a requirement for the right to rescind is powerful evidence that Congress intended notice to be sufficient. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-72 (1979) (where statutory provision is "flanked by provisions . . . that explicitly grant private causes of action," it is "[o]bvious[] [that] when Congress wished to provide" one "it knew how to do so and did so expressly");

*Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 22 n.13 (1979) ("[T]he 1970 amendments to the companion Act are another clear indication that Congress knew how to confer a private right of action when it wished to do so.").

5. Other provisions of the statute that mention courts or civil actions in the context of rescission do not reflect an intention to require the filing of a lawsuit to effectuate a rescission. Instead, these provisions govern the interaction of Section 1635 with other legal proceedings in which the right to rescind may be at issue. Section 1635(b), for example, provides that its procedures "shall apply except when otherwise ordered by a court." Congress added that language to Section 1635(b) in 1980 to clarify the equitable powers of courts in separate legal proceedings to alter the procedures set forth in that Section. *See* S. Rep. No. 96-368, at 29 (1979) ("Upon application by the consumer or the creditor, a court is authorized to modify this section's procedures where appropriate. For example, a court might use this discretion in a situation where a consumer in bankruptcy or wage earner proceedings is prohibited from returning the property.").

Courts might need to alter the Section 1635(b) procedures in a range of different circumstances. One is when the creditor seeks a declaratory judgment on the validity of the borrower's rescission. *See* Regulation Z; Truth in Lending, 75 Fed. Reg. 58,539, 58,628 (Sept. 24, 2010) ("Some creditors use the judicial process to resolve rescission issues. For example, some creditors seek a declaratory judgment whether the consumer's right to rescind has expired."). Another is when the creditor initiates a foreclosure proceeding in which the borrower asserts the right to rescind as an affirmative defense where damages

arising from the rescission offset the underlying mortgage debt. *See, e.g.*, *Beach*, 523 U.S. at 413-14. The exception for those circumstances confirms that, absent such a separate legal proceeding, no action by a court is necessary to implement Section 1635(b)'s procedures.

Similarly, the fee provision in Section 1640(a)(3) does not entail a requirement that a borrower file a lawsuit to exercise the right to rescind. That section provides for an award of costs and attorneys' fees in "any successful action to enforce . . . liability [for violations of the statute] or in *any action* in which a person is determined to have a right of rescission." 15 U.S.C. § 1640(a)(3) (emphasis added). Congress plainly was aware that the right to rescind may arise in other legal proceedings, including bankruptcy proceedings, foreclosure proceedings, or a suit under the Declaratory Judgment Act brought by either the borrower or the creditor to determine whether a right to rescind had been validly exercised. Section 1640(a)(3) operates to shift the costs of those legal proceedings to a creditor when it unlawfully refuses to honor a validly exercised rescission right. Given 1640(a)(3)'s clear effect of relieving borrowers of the burdens of litigation, it would be anomalous to suppose that Congress intended that provision to support interpreting Section 1635(a) as requiring the filing of a lawsuit to exercise the rescissionary right.

### C. The Statutory And Legislative History Verify That Congress Intended Notice To Be Sufficient To Exercise The Right To Rescind

1. The statutory history of Section 1635 evinces Congress's intent that notice be sufficient to exercise the right to rescind. Congress has revisited the right

to rescind in the Truth in Lending Act many times since 1968, both expanding it and limiting it. At no time, however, has Congress amended the provision authorizing the borrower to "rescind the transaction . . . by notifying the creditor . . . of his intention to do so." To the contrary, when faced with a proposed amendment authorizing either party to bring an action to determine the right to rescind, Congress declined to enact it.

In 1974, Congress both expanded and restricted the right to rescind, and added a provision reinforcing the Board's mandate to promulgate authoritative interpretations of the Act. In those amendments, Congress – in response to concerns that the unlimited right to rescind was causing market uncertainty – imposed a three-year time limit on the exercise of the right. *See* Pub. L. No. 93-495, § 405, 88 Stat. 1517 (codified as amended at 15 U.S.C. § 1635(f)); *see also "Fair Credit Act": Executive Session of the Subcomm. on Financial Institutions of the S. Comm. on Banking, Hous. & Urban Affairs*, 92d Cong. 121 (1972) ("The problem involved is that if a creditor failed to comply with all of the disclosure requirements, the title could be obscured or clouded indefinitely, because the consumer would then still have the right to rescind and avoid the underlying security interest."). Notably, in enacting this time limit Congress chose *not* to change the mechanism for exercising the right from a non-judicial rescission to litigation. *See* 15 U.S.C. § 1635(f). At the same time, Congress expanded the right to rescind by making clear that it applies not only to security interests that are expressly bargained for, but also to those that "aris[e] by operation of law." Pub. L. No. 93-495, § 404, 88 Stat. 1517. Finally, Congress reaffirmed

the authority of the Board to promulgate rules implementing the Act by providing immunity from liability for "any act done or omitted in good faith in conformity with any rule, regulation, or interpretation [of the Act] by the Board." *Id.* § 406, 88 Stat. 1517.

In 1977, Congress explicitly rejected an amendment to the statute that would "permit[] either party to bring an action to determine the right to rescind." *Simplify and Reform the Truth in Lending Act: Hearings on S. 1312, S. 1501, and S. 1653 Before the Subcomm. on Consumer Affairs of the S. Comm. on Banking, Hous. & Urban Affairs*, 95th Cong. 56 (1977) ("1977 Senate Hr'g") (statement of Philip C. Jackson, Jr., Governor, Board of Governors of the Federal Reserve System); *see id.* at 90 (reproducing Federal Reserve Board draft bill, § 125(d) ("Either the consumer or the creditor may bring an action to determine the consumer's right to rescind.")); S. 1846, 95th Cong. § 15(d) (introduced July 13, 1977) ("Either the consumer or the creditor may bring an action to determine the consumer's right to rescind."). When Congress considered that amendment, the Governor of the Federal Reserve Board testified that "[t]he present statute and regulation contemplated that rescission would work informally with little or no need for recourse to the courts." 1977 Senate Hr'g 56 (statement of Philip C. Jackson, Jr., Governor, Board of Governors of the Federal Reserve System). In rejecting the proposed amendment, Congress confirmed it understood that exercising the right to rescind required no lawsuit and manifested its intent to preserve that non-judicial remedy. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (finding it probative that Congress

"squarely rejected proposals to give the [Food and Drug Administration] jurisdiction over tobacco").

In the 1980 amendments to the statute, Congress again reaffirmed its intent to maintain a non-judicial rescission process. In the Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, tit. VI, 94 Stat. 132, 168 (1980), Congress amended Section 1635(b)'s rescission procedures significantly but did not alter Section 1635(a)'s provision that borrowers can rescind the transaction simply by notifying the creditor. In particular, Congress expanded the time within which the creditor must terminate the security interest and return the borrower's money from 10 days to 20 days. *See id.* § 612(a)(3)-(4), 94 Stat. 175. The 1980 amendments also explicitly authorized courts to modify the non-judicial procedures specified in Section 1635(b), resolving the controversy over whether courts were authorized to modify those procedures when the right to rescind was implicated in other judicial proceedings. *See* Robert K. Rupp, Comment, *Who Can Win in Truth in Lending Rescission Transactions?*, 43 Ohio St. L.J. 693, 708 (1982). Finally, Congress created an exception to the three-year limit on the right to rescind in Section 1635(f) for circumstances in which "any agency empowered to enforce the provisions of [the Act]" institutes an enforcement proceeding within three years after the date of the consummation of the proceeding and finds a violation of Section 1635. Pub. L. No. 96-221, § 612(a)(6), 94 Stat. 176. In such a circumstance, the borrower has until one year following the conclusion of the agency proceeding in which to exercise the right to rescind. *See id.*

In the Truth in Lending Act Amendments of 1995, Congress again both limited and expanded the right

to rescind, without altering the non-judicial nature of the rescission process. *See* Pub. L. No. 104-29, § 8, 109 Stat. 271, 275-76. First, Congress relieved creditors of liability for certain violations of the disclosure requirements and provided a safe haven from exercises of right to rescind predicated "solely" on the "form" of written notice used to inform borrowers of their rights if the creditor used the "appropriate form of written notice published and adopted by the Board" or a "comparable written notice." *Id.* § 5, 109 Stat. 274. At the same time, however, Congress extended rescission rights for borrowers in foreclosure proceedings by providing substantive grounds for rescission for borrowers in "any judicial or non-judicial foreclosure process" that are not available to other borrowers. *Id.* § 8, 109 Stat. 275-76. That expanded right to rescind is expressly limited by the three-year expiration period in Section 1635(f). *See* 15 U.S.C. § 1635(i)(2). Thus, throughout Congress's frequent engagement with the statute's right to rescind, it has preserved notice as the method of exercising that right.

Congress's acquiescence to the Federal Reserve Board's longstanding, authoritative construction of Section 1635 draws further support from that statutory history. From the outset, the Board interpreted Section 1635(a) to require only written notice to exercise the right to rescind. In 1969, the Board promulgated Regulation Z, which clarifies that "the customer shall have the right to rescind . . . by notifying the creditor by mail, telegram, or other writing of his intention to do so." 34 Fed. Reg. 2003, 2009-10 (Feb. 11, 1969). "Congress is presumed to be aware of an administrative or judicial interpretation of a statute." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Against

the backdrop of that unambiguous administrative interpretation, Congress has amended the Truth in Lending Act many times in the subsequent 46 years, including direct changes to other aspects of the right to rescind, but has never amended Section 1635(a) to require borrowers to file a lawsuit to exercise the rescission right. Indeed, as noted above, Congress considered and rejected a legislative proposal to amend Section 1635 to create a cause of action "to determine the consumer's right to rescind."

Congress's active engagement with Section 1635 against the background of its "abundant[] aware-[ness]" of Regulation Z demonstrates affirmative acquiescence in the Board's interpretation of Section 1635(a). *Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983); *see id.* ("[i]n view of its prolonged and acute awareness of so important an issue, Congress's failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced" to agency's interpretation); *Haig v. Agee*, 453 U.S. 280, 301 & n.50 (1981) (finding "weighty evidence of congressional approval of the [administrative] interpretation" when it amended a statute without changing the relevant section, thereby "adopt[ing] the administrative construction"). Congress thus has endorsed the longstanding administrative interpretation that a borrower exercises the right to rescind by notifying the creditor in writing.

**2.** The legislative debates and history of Section 1635(a) further support the conclusion that Congress intended to create a rescission right that a borrower could exercise without resort to litigation. Section 1635 was enacted to protect consumers from "fraudulent mortgage schemes ... consummated in an atmosphere of hurry, rush, and fast talking" and

empower them "to study and investigate the contemplated seriousness of the obligations which they are able to undertake." 114 Cong. Rec. at 1611 (statement of Rep. Cahill).

Representative Sullivan explained that the right to rescind was a "vitally important" provision of the statute and emphasized that "the rights given to the . . . borrower . . . have real teeth." *Id.* at 14,388 (statement of Rep. Sullivan). She clarified that, "[w]hen the debtor gives notice of intention to rescind, that voids the mortgage absolutely and unconditionally regardless of whether either the debtor or the creditor does any of the things that [Section 1635] requires be done subsequent to the giving of notice of intention to rescind." *Id.* (statement of Rep. Sullivan). In explaining the sequence of events that completes the rescission process, the conference report makes no mention of a lawsuit: "[u]pon the exercise of th[e] right" to rescind, "any security interests created under the transaction are voided, the creditor must refund any advances, and the [borrower] must tender back any property . . . which he has received from the creditor." H.R. Conf. Rep. No. 90-1397, at 26 (1968), *reprinted in* 114 Cong. Rec. 14,375, 14,382 (1968). These legislative materials corroborate that Congress intended to create a simple, non-judicial rescission remedy that would protect consumers without requiring burdensome litigation.

### D. The Statute's Purpose Confirms That Section 1635(a) Creates A Non-Judicial Rescission Right That A Borrower Exercises By Notifying The Creditor

1. At its essence, the Truth in Lending Act is a disclosure statute. Its "broad purpose [is] promoting 'the informed use of credit' by assuring 'meaningful

disclosure of credit terms' to consumers." *Ford Motor Credit Co. v Milhollin*, 444 U.S. 555, 559 (1980) (quoting 15 U.S.C. § 1601 (1970)). This Court therefore has recognized that "[t]he Truth in Lending Act was designed to remedy the problems which had developed" in the use of consumer credit and, "[t]o accomplish its desired objective, Congress determined to lay the structure of the Act broadly." *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 364-65 (1973). "Accordingly, the Act requires creditors to provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights." *Beach*, 523 U.S. at 412. Such full disclosure is intended to permit borrowers to evaluate and compare credit terms before committing to a particular credit transaction. The statute's rescission provision gives those disclosure requirements teeth by discouraging violations and by allowing borrowers to escape mortgages they entered without the full and accurate information that Congress determined they should receive. That remedial purpose is most fully realized through the simple requirement that the borrower notify the creditor to effect a rescission, without the burdens of unnecessary litigation.

**2.** In enacting the statute's rescission provision, Congress intended to codify long-settled principles of rescission law. At common law, a plaintiff who is entitled to rescind a transaction "may rescind by notice to the defendant that he has done so, if he also restores the defendant to what he gave in the transactions or tenders restoration." 1 Dan B. Dobbs, *Law of Remedies* § 4.8, at 673 (2d ed. 1993); *see also id.* § 4.3(6), at 616 ("a plaintiff is entitled to rescind by

declaring the transaction rescinded").[4] "When he has done that, the plaintiff has rescinded." *Id.* § 4.8, at 673. If the other party agrees to the rescission, "rescission is accomplished by agreement of the parties." *Id.* § 4.3(6), at 616. Even if the non-rescinding party disputes the rescission, "rescission is still accomplished, but the plaintiff must bring suit to obtain restitution of her money." *Id.* Thus, under the common law of rescission, "the court does not effect the rescission upon which restitution is based; the plaintiff effects the rescission, and the court gives a judgment for restitution if that is needed." *Id.* § 4.8, at 674. Section 1635 comports with that well-established common-law rule that notice itself effects the rescission. *See United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law.") (citation omitted).

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[4] In enacting Section 1635, Congress followed the basic outlines of the common-law rescission process, modifying the tendering procedures slightly to be more favorable to the borrower. Thus, Section 1635(a) begins with the fundamental premise that rescission is accomplished by notifying the creditor. Section 1635(b) modifies the process of non-judicial rescission by relieving the borrower of the obligation to tender restoration when he provides that notice. As Professor Dobbs observed: "Tender rules are being reformed. A federal statute aimed at consumer credit protection permits a consumer to rescind a loan transaction in some circumstances, and puts the burden on the consumer to tender restoration of the loan proceeds only after the lender has appropriately released the consumer of liability." 1 Dobbs § 4.8, at 677 (citing 15 U.S.C. § 1635(b)). Congress's intentional departure from the common law only as to the specific order of tendering highlights its adoption of the common law's non-judicial rescission remedy more generally.

3. A judicially invented requirement to file suit would introduce practical problems and would frustrate Congress's purpose in passing the statute. Such a rule does violence to the statutory text, manufactures legal obstacles for homeowners seeking to vindicate their rights under a law that was enacted to protect them, and risks flooding the federal courts with thousands of needless lawsuits to accomplish rescissions that Congress intended to be completed privately and without litigation. Reading a litigation requirement into a remedy that Congress intended to be non-judicial would bypass the procedures Congress carefully scripted in Section 1635(b) for unwinding the transaction. It thus would eviscerate the efficiencies of the statute by requiring thousands of needless lawsuits under a regime designed to process rescissions privately in the first instance and without the intervention of the courts. Accordingly, the policy goals animating Congress's purpose are achieved by interpreting Section 1635(a) to require only notifying the creditor that the borrower is exercising the right to rescind.

4. The non-judicial rescission remedy that Congress enacted does not result in any uncertainty regarding title in the mortgage markets. A borrower's notice to the creditor eliminates any commercial uncertainty to the same extent as a lawsuit. If a creditor agrees that the borrower has exercised a valid right of rescission, then there is no commercial uncertainty as the parties unwind the transaction pursuant to the procedures of Section 1635(b). If, by contrast, a creditor disputes that the borrower has a valid right of rescission – because, for example, the creditor contends it delivered all the required disclosures at closing – then the creditor may seek a

judicial determination of the validity of the borrower's right without delay. *See* 75 Fed. Reg. at 58,628 ("Some creditors use the judicial process to resolve rescission issues. For example, some creditors seek a declaratory judgment whether the consumer's right to rescind has expired."). Consequently, any remaining uncertainty is entirely the result of the creditor's own inaction. Moreover, in no circumstances would "unexercised" rights clouding title linger beyond the three-year time limit established by Section 1635(f). Either a borrower exercises the right to rescind by notifying the creditor within three years of the transaction, or the right expires when those three years lapse.

Even if a legitimate policy concern were present, the Court cannot discard the statute's plain text. When the meaning of the statutory text is clear, this Court may not rewrite the statute to avoid "practical problems" it may perceive in its implementation. *Lewis v. City of Chicago*, 560 U.S. 205, 216 (2010); *see id.* at 217 ("[I]t is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted. . . . If [the statute has] effect[s] [that were] unintended, it is a problem for Congress, not one that federal courts can fix."); *see also Caminetti*, 242 U.S. at 490 ("If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning."). Accordingly, even if Section 1635(a) created uncertainty by requiring only notice for a borrower to exercise the right to rescind, that policy concern would provide no warrant for the Court to cast aside the plain meaning of Section 1635(a)'s text.

## II. THE AUTHORITATIVE AND LONGSTANDING ADMINISTRATIVE INTERPRETATION RECOGNIZING THAT WRITTEN NOTICE IS SUFFICIENT TO EXERCISE THE RIGHT TO RESCIND IS ENTITLED TO DEFERENCE

### A. Regulation Z Resolves Any Doubt That Written Notice Is Sufficient To Exercise The Right To Rescind

The statute expressly mandates the agency to issue regulations implementing its provisions. *See* 15 U.S.C. § 1604(a) ("The Bureau shall prescribe regulations to carry out the purposes of this subchapter."). One year after the Act's passage, the Federal Reserve Board promulgated Regulation Z to implement the statute. Regulation Z specifies that, "[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram, or other means of written communication." 12 C.F.R. § 1026.15(a)(2). In the more than four decades since, the Board and now the Bureau have retained that interpretive regulation. That longstanding and consistent interpretation of Section 1635(a), left untouched by Congress and unchanged by the agencies, is entitled to deference.

This Court long has recognized that the Federal Reserve Board's interpretations of the statute warrant particular deference. As this Court explained, "[b]ecause of their complexity and variety, . . . credit transactions defy exhaustive regulation by a single statute." *Ford Motor Credit*, 444 U.S. at 559. When Congress enacted the Truth in Lending Act, it therefore "entrust[ed] its construction to an agency with the necessary experience and resources to monitor its operation." *Mourning*, 411 U.S. at 365; *see Ford*

*Motor Credit*, 444 U.S. at 559-60 (explaining that the Act "delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit"). The Act authorized the Board to "prescribe regulations to carry out the purposes of this title" and provided that "[t]hese regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions . . . , as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith." Pub. L. No. 90-321, § 105, 82 Stat. 148 (codified as amended at 15 U.S.C. § 1604). Accordingly, this Court has afforded substantial deference to the Board's authoritative interpretations of the statute in Regulation Z. *See Ford Motor Credit*, 444 U.S. at 567-68 (recognizing "an unmistakable congressional decision to treat administrative rulemaking and interpretation under [the statute] as authoritative"); *see also Mourning*, 411 U.S. at 369 ("[T]he validity of a regulation promulgated [by the Board] will be sustained so long as it is reasonably related to the purposes of the enabling legislation.") (internal quotation marks omitted).

In the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress created the Consumer Financial Protection Bureau and transferred to the Bureau the same broad authority to implement the statute that it had initially conferred on the Board. *See* Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, tit. X, § 1061(b)(1), (d), 124 Stat. 1376, 1955, 2036, 2039 (codified at 12 U.S.C. § 5581(b)(1), (d)). The Bureau then repromulgated the Board's Regulation Z without

substantive changes. *See* Interim Final Rule, Truth in Lending (Regulation Z), 76 Fed. Reg. 79,768, 79,803-04 (Dec. 22, 2011) (promulgated at 12 C.F.R. § 1026.23); Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 79,730, 79,850 (Dec. 31, 2013) ("[t]he Bureau declines to . . . amend the rescission rules") (citing 15 U.S.C. § 1635(a)). Accordingly, the same deference is due Regulation Z under the Bureau's authority as was accorded the Board.

The Board and the Bureau's interpretation is plainly a permissible construction of Section 1635(a). "[A]bsent some obvious repugnance to the statute, the Board's regulation implementing [the Truth in Lending Act] should be accepted by the courts." *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981). The agency's interpretation must "govern[] if it is a reasonable interpretation of the statute – not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009); *see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). The agency's interpretation requiring only "written notice" is clearly a reasonable construction of Section 1635(a), which specifies only "notifying the creditor" as the method of exercising the right to rescind and does not even mention a court proceeding. *See Entergy*, 556 U.S. at 220 (upholding regulation because statute did not "unambiguously preclude" agency's interpretation).

### B. The Bureau Recently Confirmed Its Interpretation Of Section 1635(a) As Requiring Only Written Notice

Since re-promulgating Regulation Z, the Bureau has explained in recent *amicus* briefs before the courts of appeals that it has accepted the Federal Reserve Board's longstanding interpretation as its own. The agency's interpretation of its own regulations advanced in its *amicus* briefs is also entitled to deference. *See Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 878 (2011) ("[W]e conclude that the text of [Regulation Z] is ambiguous, and that deference is warranted to the interpretation of that text advanced by the [agency] in its *amicus* brief."). In its *amicus* briefs, the agency unambiguously interpreted Regulation Z to require only notice to a creditor to exercise the right to rescind. *See, e.g.*, Brief of the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiff-Appellant and Reversal at 10, 14, *Rosenfeld v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012), 2012 WL 1074082 ("[u]nder the plain terms of § 1635 – and the Bureau's controlling interpretation of that provision – consumers exercise their rescission right by providing notice to their lender," and "[c]onsumers are not required also to sue their lender within the three-year period provided under [Section] 1635(f)"); *see id.* at 2 (stating that agency also would file briefs in Third, Fourth, and Eighth Circuits).

That interpretation of Regulation Z warrants this Court's deference. Regulation Z specifies that the borrower exercises the right to rescind under Section 1635(a) by notifying the creditor in writing. In its *amicus* briefs, the agency simply confirmed that the regulation imposes no further requirement,

unmentioned in the statute or in Regulation Z, that the borrower file suit. That interpretation is clearly consistent with Regulation Z and is therefore controlling. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation") (internal quotation marks omitted). Accordingly, the Court should uphold the agency's interpretation of Section 1635 and Regulation Z that notifying the creditor in writing is sufficient to exercise the right to rescind.

## III. SECTION 1635(f) DOES NOT REQUIRE A BORROWER TO FILE A LAWSUIT WITHIN THREE YEARS TO EXERCISE THE RIGHT TO RESCIND

If this Court concludes that the right of rescission can be exercised by providing written notice within three years of the transaction – as petitioners undisputedly did – the judgment below should be reversed and the case remanded. The Court need not also address when a lawsuit must be brought seeking a declaration that the rescission was effective.

In resolving the question presented, however, it is useful to understand that Section 1635(f) does not impose a requirement that the borrower file a lawsuit within three years of the transaction to exercise the right to rescind. The courts of appeals that have departed from Section 1635(a)'s plain language that notifying the creditor exercises the right to rescind have relied mistakenly upon Section 1635(f) to manufacture such a requirement. That misreading of the statute would impose an obligation to file suit when Congress intended to avoid litigation. The text, history, and purpose of Section 1635(f), confirmed by this Court's analysis in *Beach*, provide

no basis for departing from Section 1635(a)'s plain language requiring a borrower only to notify the creditor to exercise the right to rescind. As a result, petitioners' suit to enforce the rescission they already had accomplished by notifying their creditor was timely.

### A. Section 1635(f) Requires Only That A Borrower Exercise The Right To Rescind By Notifying The Creditor Within Three Years Of The Transaction

1. The text of Section 1635(f), like that of Section 1635(a), is clear: the "right of rescission shall expire three years after the date of consummation of the transaction." 15 U.S.C. § 1635(f). That provision makes no mention of a lawsuit and "talks not of a suit's commencement but of a right's duration." *Beach*, 523 U.S. at 417. In "governing . . . the right's duration," *id.*, Section 1635(f) is silent regarding the manner in which a borrower must exercise that right. Section 1635(f) thus requires only that the right to rescind be exercised – in whatever manner it must be exercised pursuant to Section 1635(a) – within three years of the consummation of the transaction. Because a borrower exercises the right to rescind under Section 1635(a) by notifying the creditor of that intention to do so, as long as the borrower provides that notice within three years of the transaction, Section 1635(f) is simply inapplicable.

The history and purpose of Section 1635(f) confirm that it establishes only a time limit within which a borrower must notify the creditor to accomplish the rescission. Congress enacted Section 1635(f) in 1974 to address the specific problem of "unexpired" rights to rescind and their potential to cloud the title of residential properties. *See* Board of Governors of the

Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1972*, at 16 (Jan. 3, 1973), *reprinted in* 119 Cong. Rec. S2803, S2813 (daily ed. Feb. 20, 1973) ("[T]itles to many residential real estate properties may become clouded by uncertainty regarding unexpired rights of rescission."); S. Rep. No. 92-750, at 1, 7 (1972) ("[t]he legislation . . . resolves a number of problems arising out of the administration of the disclosure provisions of the Truth in Lending Act as recommended by the Federal Reserve Board," and the amendments "are primarily in response to recommendations of the Federal Reserve Board for improving the administration of the Truth in Lending Act").

Congress crafted a narrowly tailored solution to this problem that did not affect the sufficiency of notice to exercise the right to rescind. Prior to the enactment of Section 1635(f), a borrower's right to rescind expired three days after the creditor provided the disclosures required under the statute, whenever that might be. As a result, when a creditor failed to provide the required disclosures, an unexpired, unexercised right of rescission could cloud title indefinitely. Section 1635(f) resolved that uncertainty by providing that unexercised rights "shall expire three years after the date of . . . the transaction." 15 U.S.C. § 1635(f). By contrast, once a borrower exercises the right to rescind by notifying the creditor, there is no uncertainty of title because both the borrower and the creditor are aware that the right has been exercised. Any dispute about the validity of that exercise can be resolved promptly. Accordingly, Section 1635(f) does not change the manner in which the right is exercised – which had been well-established and confirmed by the Board's interpretation in Regu-

lation Z for five years at the time Section 1635(f) was enacted – and does not impose a litigation requirement where one previously had not existed.

**2.** This Court's decision in *Beach* accords with that straightforward interpretation of Section 1635(f). The Court in *Beach* addressed not the method by which a borrower may exercise the right to rescind under Section 1635(a) – the only question in this case – but rather whether that right may be exercised for the first time as an affirmative defense after the three-year time limit established by Section 1635(f) had lapsed. 523 U.S. at 411-12. The *Beach* Court held that Section 1635(f) "permits no federal right to rescind, defensively or otherwise, after the 3-year period of [Section] 1635(f) has run." *Id.* at 419. It explained that Section 1635(f) "govern[s] the life of the underlying right" and "talks not of a suit's commencement but of a right's duration." *Id.* at 417. Accordingly, because the homeowner in *Beach* had not attempted to exercise the right to rescind – by suit, by notifying the creditor, or by any other means – within the three-year period of Section 1635(f), that right was extinguished when that three-year period lapsed. The Court simply held that once the unexercised right expired the homeowner could not revive it as an affirmative defense.

*Beach*'s holding therefore does not address, much less decide, the question here. As the Third Circuit explained in *Sherzer v. Homestar Mortgage Services*, 707 F.3d 255 (3d Cir. 2013), "nowhere in *Beach* does the Court address *how* [a borrower] must exercise his right of rescission within that three-year period." *Id.* at 262. Thus, "[t]he most that can be gleaned" from *Beach* is the unremarkable conclusion that, "however the right of rescission is to be exercised, it must

be done within three years." *Id.* at 263. Unlike the borrowers in *Beach*, petitioners *have* exercised their right to rescind within the three-year period, exactly as Section 1635(a) requires: "by notifying the creditor . . . of [their] intention to do so." 15 U.S.C. § 1635(a); *see* Add. 9-10. This Court's decision in *Beach* in no way questions the legitimacy of that manner of exercising the right to rescind.

**B. Petitioners' Suit Was Timely**

Petitioners' suit to enforce the rescission they already had accomplished by notifying respondents satisfies any possible statute of limitations that might apply. Section 1635 does not explicitly create a cause of action to enforce a rescission and imposes no statute of limitations on such an action. Whether such an action is brought as a suit for a declaratory judgment under 28 U.S.C. § 2201 or as a suit under an implied right of action in Section 1635(a) itself, the federal statute provides no express statute of limitations. *See* 15 U.S.C. § 1635(a); 28 U.S.C. § 2201(a) (creating right of action for declaratory relief without specifying statute of limitations). Whether the Court borrows the relevant state-law statute of limitations, as is its usual practice, or applies a one-year statute of limitations borrowed from Section 1640, petitioners' suit was timely.

**1. Petitioners' suit was timely under any possible statute of limitations borrowed from Minnesota state law**

When a federal statute does not specify a statute of limitations, this Court ordinarily borrows the most relevant statute of limitations from state law. *See North Star Steel Co. v. Thomas*, 515 U.S. 29, 33 (1995) (when "federal statutes fail to provide any limitations period for the causes of action they

create, . . . courts . . . borrow a period, generally from state law, to limit these claims"); *id.* at 33-34 (this Court's "practice has left no doubt" that state statutes of limitations are "the lender of first resort"); *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 414 (2005) (this Court "generally 'borrow[s]' the most closely analogous state limitations period"); *see also North Star Steel*, 515 U.S. at 37 (Scalia, J., concurring in the judgment) ("I remain of the view that when Congress has not prescribed a limitations period to govern a cause of action that it has created, the Court should apply the appropriate state statute of limitations, or, if doing so would frustrate the purposes of the federal enactment, no limitations period at all.").

Under that approach, petitioners' suit was timely under the appropriate state-law statute of limitations from Minnesota, where the transaction arose. Minnesota imposes a six-year statute of limitations for suits "upon a liability created by statute." Minn. Stat. Ann. § 541.05, subd. 1(2). That statute of limitations applies to the most "closely analogous" state-law cause of action: suits to enforce a state-law right of rescission for home sales when a developer fails to provide a "disclosure substantially similar to that required by the federal Truth in Lending Act." *Id.* § 83.28, subd. 1(2); *cf. Anderson v. Anderson*, 197 N.W.2d 720, 726 (Minn. 1972) (applying § 541.05 to an action to rescind a sale of real property); *Saclolo v. Shaleen*, No. A10-2165, 2011 WL 2750706, at *4-5 (Minn. Ct. App. July 18, 2011) (holding suit seeking to rescind sale of real property was time-barred by § 541.05). Section 541.05 also provides a six-year statute of limitations "upon a contract or other

obligation, express or implied, as to which no other limitation is expressly prescribed." Minn. Stat. Ann. § 541.05, subd. 1(1). Petitioners' suit was therefore filed comfortably within any applicable state-law limitations period.

**2. Petitioners' suit also is timely should the Court borrow the one-year statute of limitations found in Section 1640(e)**

Section 1640(a) creates a cause of action for damages against creditors for violations of the statute. 15 U.S.C. § 1640(a). Subject to exceptions not relevant here, Section 1640(e) then provides that "any action under this section may be brought . . . within one year from the date of the occurrence of the violation." *Id.* § 1640(e). That "statute of limitations begins to run when the cause of action 'accrues'—that is, when 'the plaintiff can file suit and obtain relief.'" *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013) (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*, 522 U.S. 192, 201 (1997)). Consequently, "this Court has often construed statutes of limitations to commence when the plaintiff is permitted to file suit." *Id.*

Petitioners' claim seeking a declaration that their rescission was effective did not accrue until respondents refused to honor the rescission effected by petitioners' written notification. Pursuant to Section 1635(b), "[w]ithin 20 days after receipt of a notice of rescission," respondents were required to "return . . . any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." 15 U.S.C. § 1635(b). A borrower cannot

sue to enforce a rescission until 20 days after notifying the creditor, because until that time the creditor may comply with Section 1635(b) by satisfying its legal obligations arising from the borrower's rescission. As a result, the creditor has not yet violated the statute until 20 days after receiving notice. Until then, a suit to enforce the rescission would be incurably premature. A subsequent suit to enforce the rescission is thus a suit to compel the creditor to tender pursuant to the right that the borrower already has exercised. Accordingly, as the court below recognized, "[t]he failure-to-rescind cause of action accrue[s] when plaintiffs request[] rescission and the bank[] denie[s] the request." *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 729 (8th Cir. 2013), *petition for cert. pending*, No. 13-705 (U.S. filed Dec. 9, 2013).

Petitioners notified respondents of their intention to rescind the mortgage transaction on February 23, 2010. *See* Add. 9-10. Respondents never took the steps required by Section 1635(b) and thereby violated the statute at the expiration of Section 1635(b)'s 20-day window on March 16, 2010. Petitioners then filed suit to enforce the rescission on February 24, 2011, within one year of respondents' violation. Their suit was therefore timely even under a one-year statute of limitations.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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July 15, 2014

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## STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The Truth in Lending Act, 15 U.S.C. § 1635, provides:

**§ 1635. Right of rescission as to certain transactions**

**(a) Disclosure of obligor's right to rescind**

Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Bureau, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Bureau, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

**(b) Return of money or property following rescission**

When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

**(c) Rebuttable presumption of delivery of required disclosures**

Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be

given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

**(d) Modification and waiver of rights**

The Bureau may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

**(e) Exempted transactions; reapplication of provisions**

This section does not apply to—

**(1)** a residential mortgage transaction as defined in section 1602(w)[1] of this title;

**(2)** a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property;

**(3)** a transaction in which an agency of a State is the creditor; or

**(4)** advances under a preexisting open end credit plan if a security interest has already been retained or acquired and such advances are in accordance with a previously established credit limit for such plan.

---

[1] Section 1602(w) of this title, referred to in subsec. (e)(1), was redesignated section 1602(x) of this title by Pub. L. 111-203, title X, § 1100A(1)(A), July 21, 2010, 124 Stat. 2107.

**(f) Time limit for exercise of right**

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

**(g) Additional relief**

In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.

**(h) Limitation on rescission**

An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Bureau, or a comparable written notice of the rights of the obligor, that was

properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.

**(i) Rescission rights in foreclosure**

**(1) In general**

Notwithstanding section 1649 of this title, and subject to the time period provided in subsection (f) of this section, in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if—

**(A)** a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

**(B)** the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Bureau or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.

**(2) Tolerance for disclosures**

Notwithstanding section 1605(f) of this title, and subject to the time period provided in subsection (f) of this section, for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge

shall be treated as being accurate for purposes of this section if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $35 or is greater than the amount required to be disclosed under this subchapter.

**(3) Right of recoupment under State law**

Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.

**(4) Applicability**

This subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995.

2. Regulation Z of the Federal Reserve Board provides in relevant part:

**12 C.F.R. § 226.23 Right of rescission.**

(a) *Consumer's right to rescind.* (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section.[47]

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail,

---

[47] For purposes of this section, the addition to an existing obligation of a security interest in a consumer's principal dwelling is a transaction. The right of rescission applies only to the addition of the security interest and not the existing obligation. The creditor shall deliver the notice required by paragraph (b) of this section but need not deliver new material disclosures. Delivery of the required notice shall begin the rescission period.

telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

(3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures,[48] whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

(4) When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

(b)(1) *Notice of right to rescind.* In a transaction subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy to each if the notice is delivered in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act). The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:

---

[48] The term 'material disclosures' means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §§ 226.32(c) and (d) and 226.35(b)(2).

(i) The retention or acquisition of a security interest in the consumer's principal dwelling.

(ii) The consumer's right to rescind the transaction.

(iii) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(iv) The effects of rescission, as described in paragraph (d) of this section.

(v) The date the rescission period expires.

(2) *Proper form of notice.* To satisfy the disclosure requirements of paragraph (b)(1) of this section, the creditor shall provide the appropriate model form in Appendix H of this part or a substantially similar notice.

* * *

Larry Jesinoski
Cheryle Jesinoski
4165 Cashell Glen
Eagan, MN 55122

Date February 23rd 2010

Bank Of America Fax Correspondence Number
1-805-520-5019

Delivery Confirmation Mail Return Receipt # 7009
0820 0001 5826 3285

To: Bank of America
P.O. Box 5170
Simi Valley 93062-5170

Attn: Legal Department Regarding Account Number 159328556
Re: Original Loan # 159328556 (America's Wholesale Lender)
Property address: 4165 Cashell Glen
Eagan, MN 55122

**ACTUAL NOTICE TO RESCIND**

Dear Legal Department:

On or about February 23rd 2007, a federally related mortgage loan transaction was closed utilizing America's Wholesale Lender as the Lender. The transaction was subsequently, and soon thereafter, transferred to Bank of America for purported servicing.

We have conducted a reasonable investigation and inquiry into this matter and concluded that this transaction was ratified without sufficient and

correct evidence that all obligors were in fact provided the following:

Sufficient correct copies of our Notice of Right to Cancel under 15 U.S.C. § 1635(a); Reg. Z §§ 226.23(a), and
Sufficient correct copies of a Truth in Lending Disclosure Statement under Reg. Z §§ 226.23(b)

The foregoing material disclosures were not provided in a manner we could retain.

In addition, we did not receive the correct Truth in lending Disclosure Statements and we are entitled to two copies of this document. The (your) failure to provide effective notice of these mandatory disclosures effectively extends our rescission rights under 15 U.S.C. § 1635(f).

We hereby give effective notice to rescind and cancel the transaction indicated above without any further notice. Notice to the Principals is Notice to the Agent and Notice to the Agent is Notice to the Principals.

| | |
|---|---|
| 2/23/10 | 2/23/10 |
| Date | Date |
| /s/ LARRY JESINOSKI | /s/ CHERYLE JESINOSKI |
| Larry Jesinoski | Cheryle Jesinoski |

# RESPONDENT'S BRIEF

No. 13-684

IN THE

# Supreme Court of the United States

LARRY D. JESINOSKI AND CHERYLE JESINOSKI,
*Petitioners,*

*v.*

COUNTRYWIDE HOME LOANS, INC.,
SUBSIDIARY OF BANK OF AMERICA, N.A.,
D/B/A AMERICA'S WHOLESALE LENDER, *et al.*,
*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

## BRIEF FOR RESPONDENTS


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## QUESTION PRESENTED

When a borrower sends notice of his intention to rescind and the lender disputes the borrower's right to rescind, must the borrower bring any suit for rescission before the right of rescission expires under the three-year statute of repose?

## CORPORATE DISCLOSURE STATEMENT

BAC Home Loans Servicing, LP is now known as Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, L.P. Bank of America, N.A. is wholly owned by Bank of America Corporation. Bank of America Corporation has no parent corporation, and no publicly held company owns 10% or more of Bank of America Corporation's stock.

Countrywide Home Loans, Inc., d/b/a America's Wholesale Lender, is a wholly owned subsidiary of Countrywide Financial Corporation, which in turn is a wholly owned subsidiary of Bank of America Corporation. Bank of America Corporation has no parent corporation, and no publicly held company owns 10% or more of Bank of America Corporation's stock.

Mortgage Electronic Registration Systems, Inc. is a wholly owned subsidiary of MERSCORP Holdings, Inc. MERSCORP Holdings, Inc. is a privately held company with two entities, Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac), holding more than a 10% interest. No other corporation owns 10% or more of MERSCORP Holdings, Inc.

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IN THE

# Supreme Court of the United States

No. 13-684

LARRY D. JESINOSKI AND CHERYLE JESINOSKI,
*Petitioners*,

*v.*

COUNTRYWIDE HOME LOANS, INC.,
SUBSIDIARY OF BANK OF AMERICA, N.A.,
D/B/A AMERICA'S WHOLESALE LENDER, *et al.*,
*Respondents*.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

## BRIEF FOR RESPONDENTS

## INTRODUCTION

The Truth in Lending Act permits certain borrowers to rescind their mortgage loans within three days of the loan closing, or to do so at a later date if the lender violated TILA by failing to deliver required disclosures. Recognizing that rescission is a grave remedy, Congress enacted an uncompromising statute of repose under which the right of rescission expires three years after the closing of the loan, cutting off any rescission remedy.

TILA and its implementing regulation require borrowers seeking rescission to notify their lenders of their intention to rescind by sending written notice. In some cases, the lender may acknowledge the borrower's right to rescind, and the parties will mutually carry out the multi-step rescission process that Congress outlined in the statute. In other cases, however, the lender will dispute the borrower's right to rescind, denying the borrower's assertion that the lender in fact violated TILA. Under petitioners' reading of the statute, the lender's objection is of no importance because the mere sending of notice unilaterally effectuates the rescission. Congress took a different view, however, recognizing that litigation would be required and a court would need to adjudicate the borrower's contested right to rescind and "award" any "rescission" to which the borrower may be entitled. 15 U.S.C. § 1635(g); *see id.* § 1640(a)(3). And Congress emphatically declared that the right of rescission, the necessary foundation for any suit for rescission, expires after three years. *Id.* § 1635(f).

The question presented here is of consequence only in a narrow, though frequently reprised, set of circumstances: where the borrower sends notice of his intention to rescind within three years of the loan closing, the lender disputes the borrower's right to rescind, and the borrower files suit after the three years have run. In these cases, the borrower's lawsuit is time-barred by TILA's statute of repose, notwithstanding any notice of his intention to rescind sent to the lender within three years of the loan closing. Petitioners' view that merely sending notice is sufficient in a contested case to effectuate rescission is inconsistent with the statutory text, Congress's intent, and the common law of rescission.

What is more, petitioners' reading of TILA would thwart Congress's purpose in enacting the repose provision. Petitioners ask this Court to assume, implausibly, that the same Congress that enacted an absolute statute of repose in order to address concerns about clouds on title was indifferent to the effects of unresolved, contested rescission claims. It is also implausible to say, as petitioners do, that Congress intended clouds on title occasioned by notices of intention to rescind to be resolved through declaratory judgment actions filed by lenders. That claim finds no support in TILA, which recognizes that the borrower will sue for an "award" of "rescission." 15 U.S.C. § 1635(g).

Petitioners signed a written acknowledgement at their loan closing, attesting to their receipt of all the disclosures required by TILA. Three years to the day later, facing foreclosure, they sent notice of their intention to rescind on the ground that they allegedly did not receive the required number of copies of disclosures—thus claiming as a matter of statutory right the return of all the interest and fees they paid in connection with a sizeable loan they used to pay off outstanding consumer debt. And predictably, having defaulted, they provided no indication that they could tender the loan principal. In view of petitioners' signed acknowledgement of receipt of the disclosures in question, respondents disputed petitioners' right to rescind. Petitioners then brought a lawsuit for rescission, more than four years after the loan closing. Under TILA's statute of repose, any right to rescind had already definitively expired—three years after the loan closing. Petitioners' lawsuit is barred, and the judgment of the court of appeals should be affirmed.

## STATEMENT

### A. TILA

Congress enacted the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*, in 1968 to promote the "informed use of credit" by requiring "meaningful disclosure of credit terms," *id.* § 1601(a). Specifically, Congress sought to address the dangers of "blind economic activity"—credit transactions in which consumers were "ignorant of the nature of their credit obligations and of the costs of deferring payment." *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 363, 364 (1973). TILA accordingly requires lenders to provide "clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights." *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998).

TILA is often described by courts as a "'hypertechnical'" statute, *Marr* v. *Bank of Am., N.A.*, 662 F.3d 963, 964 (7th Cir. 2011), whose provisions must be "absolutely complied with and strictly enforced," *Mars* v. *Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983). Congress's amendments over time have nonetheless "made manifest that although it had designed TILA to protect consumers, it had not intended that lenders would be made to face overwhelming liability for relatively minor violations." *McKenna* v. *First Horizon Home Loan Corp.*, 475 F.3d 418, 424 (1st Cir. 2007); *see also American Mortg. Network, Inc.* v. *Shelton*, 486 F.3d 815, 819 n.4 (4th Cir. 2007) (clarifying that its comment in *Mars* "was not to imply … that the Act's requirements should not be reasonably construed and equitably applied"); *Smith* v. *Highland Bank*, 108 F.3d 1325, 1327 n.4 (11th Cir. 1997) ("Congress would

not have us adopt a hypertechnical reading of any part of TILA.").

As relevant to this case, the statute and its implementing regulation require that, subject to exceptions not applicable here, a lender shall provide to "each consumer whose ownership interest is or will be subject to [a] security interest," 12 C.F.R. § 1026.23(a)(1), two copies of a notice of the right to rescind (also referred to as the notice of right to cancel), *id.* § 1026.23(b)(1), and a TILA disclosure statement outlining specified material terms, 15 U.S.C. § 1602(v).[1] These disclosures must be made "clearly and conspicuously in writing, in a form that the consumer may keep." 12 C.F.R. § 1026.17(a)(1).

At a mortgage closing, lenders conventionally provide borrowers with the required disclosures and ask them to sign an acknowledgement of receipt, a practice Congress recognized when TILA was first enacted. *See* Consumer Credit Protection Act, Pub. L. No. 90-321, § 125(c), 82 Stat. 146, 153 (1968) (discussing "written acknowledgement of receipt of any disclosures"). The Consumer Financial Protection Bureau has prescribed the form of the required TILA disclosures and authorizes lenders to "include an acknowledgement of receipt" among them. 12 C.F.R. § 1026.17(a)(1). TILA provides that this acknowledgement establishes "a rebuttable presumption of delivery" of the acknowledged disclosures. 15 U.S.C. § 1635(c).

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[1] The right to rescind does not extend to purchase-money mortgages or mortgages securing any dwelling other than the borrower's principal residence. 15 U.S.C. §§ 1635(a), (e), 1602(x).

**B. Rescission Under TILA**

1. Congress created the right of rescission to address fraudulent practices by home improvement contractors, about which Congress heard extensive testimony leading up to TILA's enactment. *See Unfair Practices in the Home Improvement Industry and Amendments to the FTC Act: Hearing Before the S. Comm. on Commerce*, 90th Cong. 2 (1968). Specifically, Congress learned about "home improvement racketeers who trick homeowners, particularly the poor, into signing contracts at exorbitant rates, which turn out to be liens on the family residences." 114 Cong. Rec. H4114, H4118 (May 22, 1968) (statement of Rep. Sullivan). As the Second Circuit explained, "[t]he typical home improvement contract is procured, usually under pressure conditions, by a prime contractor ... who frequently possesses little or no capital of its own; the actual work is often done by various subcontractors." *N. C. Freed Co.* v. *Board of Governors of Fed. Reserve Sys.*, 473 F.2d 1210, 1215 (2d Cir. 1973). "One of the problems mentioned during those hearings was where the homeowner paid the contractor, then discovered the subcontractor recorded a lien on the home, and had to pay twice." *Rudisell* v. *Fifth Third Bank*, 622 F.2d 243, 250-251 (6th Cir. 1980).

To remedy this problem, and to provide homeowners some recourse against contractors who fail to disclose the consequences of a loan secured by real property, Congress enacted the provision now codified at 15 U.S.C. § 1635(a), giving homeowners the right to rescind their mortgage loans under certain conditions. *See Gardner & N. Roofing & Siding Corp.* v. *Board of Governors of Fed. Reserve Sys.*, 464 F.2d 838, 841 (D.C. Cir. 1972) ("The specific purpose of section 125(a), 15 U.S.C. § 1635(a), was to protect homeowners from the

unscrupulous business tactics of certain home improvement contractors." (discussing legislative history)). Rescission is "the most draconian remedy available" to borrowers under TILA. 141 Cong. Rec. S14,566, S14,567 (Sept. 28, 1995) (statement of Sen. D'Amato). "When a loan is rescinded, the borrower is released from the obligation under the mortgage" and is "entitled to reimbursement of all finance charges, as well as other charges." *Id.*

2. Rescission was an established contractual remedy at common law, long before TILA was enacted. The doctrine "provided for restoration of the status quo by requiring the buyer to return what he received from the seller." *Pinter* v. *Dahl*, 486 U.S. 622, 641 n.18 (1988). Important for present purposes, common-law rescission could be had at law or in equity; each entails critically different procedures and consequences for the rescinding party, the non-rescinding party, and the courts.

"[R]escission at law occurs when the plaintiff has a right to unilaterally avoid a contract. The rescission itself is effected when the plaintiff gives notice to the defendant that the transaction has been avoided and tenders to the defendant the benefits received by the plaintiff under the contract." *Griggs* v. *E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 445-446 (4th Cir. 2004). There are two recognized preconditions to "unilateral" rescission at law. First, the plaintiff must "hav[e] grounds justifying rescission." *Acton* v. *J.B. Deliran*, 737 P.2d 996, 999 n.5 (Utah 1987); *see Lillis* v. *Steinbach*, 99 P. 22, 24 (Wash. 1909) ("notices ... did not rescind the contract, because the appellant ... had no right to rescind"); *see also* 3 Black, *A Treatise on the Rescission of Contracts and Cancellation of Written Instruments* § 569, at 1403 (2d ed. 1929) ("notice of rescission is not

effectual for any purpose unless given at a time when the party has a clear right to rescind"). Second, the borrower must, when giving notice of his election of rescission, simultaneously "tender[] to the defendant the benefits received ... under the contract." *Griggs*, 385 F.3d at 445-446; *see also* 17 Am. Jur. 2d *Contracts* § 512, at 995 (1964) ("One cannot have the benefits of rescission without assuming its burdens."). Once a party both gives notice of rescission and tenders, the contract is void, and the rescinding party may bring an action seeking restitution of the consideration he provided to his counterparty. *See, e.g.*, *Omlid* v. *Sweeney*, 484 N.W.2d 486, 490 (N.D. 1992); *Brown* v. *Techdata Corp.*, 234 S.E.2d 787, 791 (Ga. 1977) (per curiam); *Bollenbach* v. *Continental Cas. Co.*, 414 P.2d 802, 804-806 (Or. 1966) (en banc); *see also* 1 Dobbs, *Law of Remedies* § 4.8, at 673-674 (2d ed. 1993).

In contrast, equitable rescission—also known as judicial rescission—is not effected unilaterally by the rescinding party but rather requires adjudication of that party's right to rescind.

> In equity, ... the rescission is effected by the decree of the equity court which entertains the action for the express purpose of rescinding the contract and rendering a decree granting such relief. In other words, a court of equity grants rescission or cancellation, and its decree wipes out the instrument, and renders it as though it does not exist.

*Haumont* v. *Security State Bank*, 374 N.W.2d 2, 7 (Neb. 1985) (internal quotation marks omitted); *see Cruickshank* v. *Griswold*, 104 A.2d 551, 552 (R.I. 1954). An action for rescission in equity is required, for example, "'[w]here the attempt to rescind has been

ineffectual.'" *Omlid*, 484 N.W.2d at 490 n.3 (quoting Koford, Comment, *Rescission at Law and in Equity*, 36 Cal. L. Rev. 606, 607 (1948)).

While a consumer's tender is required in both rescission at law and in equity, there is an important distinction between the two: Under rescission "in equity, a person suing to rescind a contract, as a rule, is not required to restore the consideration at the very outset of the litigation." *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422, 426 (1998). That is because, in equity, the "action does not proceed as *upon* a rescission, but proceeds *for* a rescission." *Gould* v. *Cayuga County Nat'l Bank*, 86 N.Y. 75, 83 (1881) (emphasis added).

3. TILA codified a statutory right to rescind certain mortgage loans, furnishing borrowers with a new basis for rescinding and prescribing the steps necessary by both parties to accomplish that rescission. Subject to exceptions not relevant here, *see supra* n.1, when a borrower secures a loan with his principal dwelling, section 1635(a) provides that he

> shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section ... , whichever is later, by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so.

15 U.S.C. § 1635(a).

Thus, if the borrower gives notice within three days after consummation, his right to rescind is "unconditional." *Thompson* v. *Irwin Home Equity Corp.*, 300 F.3d 88, 89 (1st Cir. 2002). It can be invoked "for

any reason or for no reason"—the borrower need not allege any violation of TILA. *McKenna*, 475 F.3d at 421. Outside the initial three-day period, however, the borrower's right to rescind depends upon whether the lender violated TILA. Borrowers "only have a right to rescind after the three day period has passed if the right to rescind was not disclosed or if other material disclosures were not made as required." *Rudisell*, 622 F.2d at 251.

Section 1635(a) requires a borrower to "notify[]" the lender "of his intention to" rescind. Section 1635(b) then prescribes the steps both parties must carry out to return to the *status quo ante*—*i.e.*, to accomplish rescission. Specifically, within 20 calendar days after receipt of notice, the lender must return any money or property given in connection with the transaction and take all necessary or appropriate action to reflect the termination of the security interest. 15 U.S.C. § 1635(b); 12 C.F.R. § 1026.23(d)(2). When the lender has performed its obligations, the borrower must tender the money or property to the lender or, if that is impracticable or inequitable, must tender the property's reasonable value. 15 U.S.C. § 1635(b); 12 C.F.R. § 1026.23(d)(3). "[U]pon such a rescission," the borrower "is not liable for any finance or other charge, and any security interest given by the obligor ... becomes void." 15 U.S.C. § 1635(b); *see* 12 C.F.R. § 1026.23(d)(1). These procedures "apply except when otherwise ordered by a court." 15 U.S.C. § 1635(b); *see* 12 C.F.R. § 1026.23(d)(4).

The process outlined in section 1635(b) plays out differently, depending upon when the borrower seeks rescission. Within three business days after closing, the process is simple and "straightforward": The borrower's right to rescind is incontestable and "loan funds

typically have not been disbursed yet." 75 Fed. Reg. 58,539, 58,547 (Sept. 24, 2010); *see also* 12 C.F.R. § 1026.23(c) ("no money shall be disbursed other than in escrow" and "no services shall be performed" until lender "is reasonably satisfied that the consumer has not rescinded").

Outside that three-day period, however, the rescission "process is problematic," given that funds have already been disbursed (and may have been spent by the borrower), security interests have been perfected, and, most important, the claimed right itself can be contested. *See, e.g.*, 75 Fed. Reg. at 58,547. When a borrower asserts a right to rescind in this context, the lender may agree that it violated TILA and rescind the loan. In those cases, the borrower and lender follow the statutory process for unwinding the mortgage described above. *Cf. Keiran* v. *Home Capital, Inc.*, 720 F.3d 721, 728 n.4 (8th Cir. 2013), *petition for cert. filed*, No. 13-705 (U.S. Dec. 9, 2013).

As in this case, however, the lender may dispute the borrower's right to rescind because, for example, the lender maintains that it did not violate TILA's notice and disclosure requirements. In that event, the rescissionary steps set forth in section 1635(b) will not take place, and the borrower's right to rescind must be established by judicial resolution. *See, e.g.*, *Yamamoto* v. *Bank of N.Y.*, 329 F.3d 1167, 1172 (9th Cir. 2003) ("[i]n a contested case," borrower "'rescinds' the transaction" only when "the right to rescind is determined in the borrower's favor"). TILA therefore recognizes the availability of an "action in which it is determined that a creditor has violated" section 1635 by making inadequate disclosures at the loan closing, 15 U.S.C. § 1635(g), and "in which a person is determined to have a right of rescission under section 1635," *id.*

§ 1640(a)(3); *see id.* § 1640(c) (recognizing "action brought under ... section 1635"). In that action brought under section 1635, it is the court that "award[s]" "rescission." *Id.* § 1635(g); *see id.* § 1640(a)(3); *see also id.* § 1640(g) (recognizing "remedy permitted by section 1635"). TILA establishes a "rebuttable presumption" to govern in that litigation—that a borrower who signed an acknowledgement of receipt of disclosures did in fact receive the required forms. *Id.* § 1635(c). TILA also authorizes the court to alter the procedures set forth in section 1635(b).

4. TILA originally placed no time limit on a borrower's ability to seek a rescission. *See* Pub. L. No. 90-321, § 125, 82 Stat. at 152-153. That omission proved problematic.

As the Board of Governors of the Federal Reserve System and the National Commission on Consumer Finance emphasized to Congress, the uncertainty surrounding unexpired rescission rights placed clouds on titles and the enforceability of loans. Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1972* (Jan. 3, 1973), *reprinted in* 119 Cong. Rec. S2803, S2813 (Feb. 20, 1973) (without "any limit on the length of time that the right continues where the creditor has failed to notify the customer of his right," "the titles to many residential real estate properties may become clouded by uncertainty regarding unexpired rights of rescission"); Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1971*, at 19 (Jan. 3, 1972) (same); National Commission on Consumer Finance, *Consumer Credit in the United States* 189-190 (1972) ("*Consumer Credit*") ("The FRB pointed out in two previous reports that the rescission period runs indefinitely unless required

disclosures have been made and notice of rescission provided. This clouds the titles to many residential properties and injures consumers in the long run."). The Federal Reserve Board and the National Commission therefore recommended to Congress that it enact a three-year "outside limit on the time the right of rescission may run." 119 Cong. Rec. at S2815; *see Consumer Credit* 190 (Congress should amend TILA to "limit the time the right of rescission may run where the creditor has failed to give proper disclosures").

Congress amended the Act in 1974 to respond to these concerns and put an end to any uncertainty. In an amendment titled, "Time limit for right of rescission," Congress categorically stated that a borrower's right of rescission "shall expire" three years after consummation of the loan transaction. Pub. L. No. 93-495, § 405, 88 Stat. 1500, 1517 (1974), *as amended*, Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 612(a)(6), 94 Stat. 132, 176; 15 U.S.C. § 1635(f).[2]

5. TILA originally delegated responsibility for implementing and promulgating rules regarding the Act to the Federal Reserve Board. Pub. L. No. 90-321, § 105, 88 Stat. at 148. The following year the Board promulgated Regulation Z, TILA's implementing regulation. 12 C.F.R. pt. 226.

The Board administered TILA for the next 40-plus years, until the Dodd-Frank Wall Street Reform and Consumer Protection Act transferred authority to the

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[2] This three-year limit, as enacted in 1974, applied in all circumstances. In 1980, Congress added one narrow exception (not applicable here), extending the repose period when an agency "institutes a proceeding" to enforce the provisions of section 1635. Pub. L. No. 96-221, § 612(a)(6), 94 Stat. at 176.

Consumer Financial Protection Bureau on July 21, 2011. *See* Pub. L. No. 111-243, § 1061(b)(1), (d), 124 Stat. 1376, 2036, 2039 (2010) (codified at 12 U.S.C. § 5581(b)(1), (d)); 75 Fed. Reg. 57,252, 57,252 (Sept. 20, 2010). In December 2011, the Bureau republished the Board's Regulation Z as 12 C.F.R. §§ 1026 *et seq.* *See generally* 76 Fed. Reg. 79,768 (Dec. 22, 2011). That regulation requires that, "[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication." 12 C.F.R. § 1026.23(a)(2).

Both the Board and the Bureau have acknowledged that "courts are frequently called upon to resolve rescission claims." 75 Fed. Reg. at 58,629; *see* 12 C.F.R. pt. 1026, Supp. I, cmt. § 1026.23—Right of Rescission ¶ 23(d)(4) ("Where the consumer's right to rescind is contested by the creditor, a court would normally determine whether the consumer has a right to rescind[.]"). Regulation Z, however, does not address what a borrower must do to obtain resolution of a contested assertion of rescission, and by when the borrower must do it.

### C. Petitioners' Facts

In recent years, the mine run of TILA rescission cases has arisen from the following fact pattern: Borrowers—often in default on their mortgages and facing foreclosure—inform their lenders of their intent to rescind because, years into the mortgage, the borrowers assert that they were not provided the required number of copies of the disclosures prescribed by TILA. In these cases, the borrowers signed an acknowledgement at the loan closing, attesting to their receipt of all required copies of all required disclosures. They do not claim any substantive defect in the disclosures, nor do

they claim that the lender failed to provide the disclosures at all; they claim only that they did not receive duplicates of the required forms. These are the facts of the three petitions for certiorari pending before this Court, raising the same legal question presented here, and they are the facts of petitioners' case.

On February 23, 2007, petitioners refinanced the mortgage on their primary residence by executing a promissory note for $611,000 with respondent Countrywide Home Loans, Inc. Pet. App. 5a. At the loan closing, each petitioner signed disclosures acknowledging full lender compliance with the pertinent TILA requirements—*i.e.*, the petitioners' "'receipt of two copies of NOTICE OF RIGHT TO CANCEL and one copy of the Federal Truth in Lending Disclosure Statement.'" *Id.*; *see also id.* 7a n.3. Petitioners used the proceeds of the loan to "'pa[y] off multiple consumer debts.'" *Id.* 5a (alteration in original).

On February 23, 2010, three years to the day after the loan closing, petitioners notified respondents of their intention to rescind the loan, asserting that while Countrywide had provided the required disclosures at closing, Countrywide had allegedly failed to provide the required number of copies of the disclosures. Pet. 6; Pet. Br. 8. At the time, petitioners were "in default" (Arg. Recording 13:37-40 (8th Cir. Dec. 11, 2012)), and, according to them, facing foreclosure (JA25 (alleging that, absent court intervention, "wrongful forced sale foreclosure" will result); *see also* JA21 (original complaint, alleging that "Defendants have proceeded to ... unlawfully initiate and continue a foreclosure proceeding by posting a sale")). Petitioners made no mention in their notice of an offer or ability to tender the loan proceeds. *See* Pet. Br. Add. 9-10.

Within 20 days, respondent BAC Home Loans Servicing, LP replied to petitioners' notice and denied that they had a right to rescind. Pet. App. 5a. On February 24, 2011—four years and one day after the loan closed—petitioners filed their "Complaint for Rescission, Damages & Jury Trial." JA12. Petitioners filed the operative "Amended Complaint for Rescission, Damages & Jury Trial" on July 22, 2011. JA24. In their prayer for relief, petitioners sought "[r]escission of [the] transaction," actual and statutory damages, and declaratory relief. JA35-36.

Respondents moved for judgment on the pleadings on the ground that petitioners' suit was barred by TILA's three-year statute of repose. The district court granted respondents' motion, holding that "a suit for rescission filed more than three years after consummation of an eligible transaction is barred by TILA's statute of repose." Pet. App. 9a. The court did not address the contested factual question whether petitioners received the requisite number of copies, but noted that their "assertion that they did not receive the required number of disclosures is undermined by documents submitted by Defendants demonstrating that Plaintiffs signed the disclosure documents acknowledging receipt by each Plaintiff of sufficient copies." *Id.* 7a n.3.

The court of appeals affirmed. Relying on its earlier decision in *Keiran*, 720 F.3d 721, the court concluded that "a party seeking to rescind a loan transaction must file suit within three years of consummating the loan." Pet. App. 2a. The Eighth Circuit denied rehearing en banc. *Id.* 10a.

## SUMMARY OF ARGUMENT

I. A. Section 1635(a) gives certain borrowers the "right to rescind" their mortgage loans and requires that they "notify[]" their lender of their "intention to do so." That provision, however, says nothing about what a borrower must do to effectuate a rescission of his loan. Congress provided that direction in section 1635(b) and (g), where it created two rescissionary procedures for a borrower to pursue, depending on whether his right to rescind is in fact in dispute. In neither case does the borrower's notice of "intention to" rescind effectuate a rescission.

Where a borrower's right to rescind is uncontested, section 1635(b) prescribes a series of steps for the mutual accomplishment of rescission, including the lender terminating the security interest and the borrower tendering the loan principal. In contrast, where, as here, more than three days have elapsed since the loan closing and the lender denies it failed to provide the required disclosures, the Act prescribes a different procedure for a borrower seeking rescission: He must go to court and sue for an "award" of "rescission." 15 U.S.C. § 1635(g); *see id.* § 1640(a)(3). Thus, in this contested case, where petitioners' *right* to rescind is in dispute and the parties accordingly have not restored each other to the *status quo ante* through the statutory procedures in section 1635(b), petitioners were required to sue for any rescission.

This interpretation of TILA is reinforced by the common law, which created two alternative ways of accomplishing rescission. Under the common law, rescission can be effectuated unilaterally (at law) only upon a valid notice accompanied by tender, thereby ensuring restoration of the status quo by the rescinding party.

By contrast, the intervention of a court is necessary (in equity) to award rescission where a party's right to rescind is contested. Petitioners and the United States insist that TILA is meant to mirror common-law rescission at law, but that is clearly wrong. First, Congress separated notice from the obligation of tender, both of which are necessary under the common law to accomplish a unilateral rescission. Second, by underscoring the need for judicial intervention to "award" "rescission" in the case of a dispute, Congress enacted a regime that more closely resembles rescission in equity, whereby rescission must be decreed by a court.

B. TILA originally placed no time limit on a borrower's ability to seek a rescission. In response to concerns from federal regulators that unexpired rescission rights placed clouds on title and the enforceability of loans, Congress enacted a three-year statute of repose. In an amendment titled "Time limit for right of rescission," Congress categorically stated that a borrower's right of rescission "shall expire" three years after the consummation of the loan transaction. Pub. L. No. 93-495, § 405, 88 Stat. 1500, 1517 (1974).

As the Court unanimously confirmed in *Beach* v. *Ocwen Federal Bank*, 523 U.S. 410, 416 (1998), that provision, codified at 15 U.S.C. § 1635(f), "'operates ... to extinguish the right which is the foundation for the claim'"—*i.e.*, rescission. It therefore necessarily "limits ... the time for bringing a suit, by governing the life of the underlying right." *Id.* at 417. Because petitioners filed their lawsuit seeking rescission after section 1635(f)'s three-year limit, their rescission claim is time-barred.

II. Petitioners' interpretation would frustrate Congress's objectives in enacting TILA's statute of repose.

On petitioners' view, as long as a borrower sends a notice of intention to rescind within the three-year period, the borrower has an indefinite number of additional years to bring suit to obtain an "award" of "rescission." Any limit on the time for filing suit—an issue, petitioners oddly say, the Court need not even address—should be drawn from state statutes of limitations or from 15 U.S.C. § 1640, even though section 1635(f) already imposes a three-year statute of repose. But section 1640 applies to claims for damages, not rescission. And it is highly implausible that Congress, after creating an extraordinary remedy and then enacting an uncompromising three-year limitation on the underlying right, meant to leave the time for actually seeking an award of that remedy subject to a patchwork of 50 States' laws as interpreted by various courts.

As petitioners see it, Congress's solution to the problem of clouds on title was not to extinguish the borrower's right of rescission three years after closing, but instead to require the borrower only to notify the lender within those three years, and take no further action if his notice is rejected, placing the burden on the lender to sue for a declaratory judgment. That would proliferate avoidable and unnecessary litigation. It is a no-lose proposition for a borrower to send a lender written notice of his intention to rescind—an act outside the requirements of the Federal Rules of Civil Procedure—even where, as here, he has previously acknowledged receiving his disclosures. Lenders would thus be required to initiate countless declaratory judgment actions against frivolous notices of borrowers' intention to rescind or suffer the very clouds on title Congress sought to eliminate. But there is no indication Congress contemplated anything like that.

Rather, under the scheme set forth in section 1635, it is the borrower—the one who claims a violation of TILA and seeks an "award" of "rescission" based on that claim—who brings suit.

III. TILA's text should be the end of the matter. But in any event, no deference is due the CFPB's litigation views. First, the CFPB's regulation concededly provides no clarity on the relevant statutory interpretation issue here: What must a borrower do to obtain resolution of a contested assertion of rescission, and by when must the borrower do it? Second, the CFPB's view on that issue, set forth in its amicus briefs, finds no footing in TILA's text, disregards Congress's intent, and has no basis in any special agency expertise.

## ARGUMENT

### I. PETITIONERS' RESCISSION CLAIM IS TIME-BARRED

Petitioners' argument starts from the "fundamental premise" that they fully accomplished rescission in this contested case at the time they sent their notice of intention to rescind—the only act they took within the three-year repose period relative to their asserted right to rescind—even if the notice were itself not valid because it was predicated on an alleged TILA violation that respondents contend did not occur. Pet. Br. 32 n.4. In other words: Despite signing acknowledgements that each received the required number of copies of disclosures that they later claimed, in the face of impending foreclosure, never to have received, petitioners—merely by sending notice—reduced respondents from secured to unsecured creditors and, without any tender or other indication that they could or would restore the status quo, became entitled to the return of all interest

and fees they had paid and to relief from any duty to make loan payments in the future.

That position is flawed. Under TILA's text, supported by the common law, rescission in a contested case is not effectuated automatically upon a borrower's unilateral notice. The statute says that petitioners' right to rescind depends on a TILA violation. It also says that where the right to rescind is denied (because the TILA violation is denied), petitioners may assert their claim in court for an "award" of "rescission." And it says that they have three years to do so. Since petitioners sued for rescission after the three-year limit, their rescission claim is time-barred.

### A. In A Contested Case, A Borrower Can Obtain Rescission Only By Bringing Suit

#### 1. When a borrower's alleged right to rescind depends on the existence of a fact the lender denies, rescission does not occur upon notice but rather requires that a court award that remedy

a. The statutory "'right which is the foundation'" for the remedy of rescission is set forth in 15 U.S.C. § 1635. *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998). Section 1635(a) provides that a borrower "shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section ... , whichever is later." Under this provision, a borrower has no right to rescind beyond the three days following consummation unless the lender violated TILA by failing to deliver the required disclosures.

Under section 1635(a), a borrower seeking to rescind his mortgage must "notify[]" the lender "of his intention to do so." That notice of "intention to" rescind is not the same as "rescission" in cases where the borrower's right to rescind is in dispute. To the contrary, where the lender disputes the borrower's claim of a TILA violation, only a court may "award" "rescission." 15 U.S.C. § 1635(g); *see id.* § 1640(a)(3).

Petitioners assert (Br. 32 n.4) that section 1635(a) "begins with the fundamental premise that rescission is accomplished by notifying the creditor." That is wrong and has rightly been rejected by a majority of the courts of appeals to have addressed it.[3] "By the plain language of" section 1635(a), a borrower's notice "does not actually rescind the transaction but merely communicates the obligor's '*intention* to [rescind the transaction].'" *Hartman* v. *Smith*, 734 F.3d 752, 760 n.2 (8th Cir. 2013) (quoting 15 U.S.C. § 1635(a)) (emphasis and alterations in original).

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[3] *See, e.g.*, *McOmie-Gray* v. *Bank of Am. Home Loans*, 667 F.3d 1325, 1327 (9th Cir. 2012) ("Rescission is not automatic upon a borrower's mere notice[.]"); *American Mortg. Network, Inc.* v. *Shelton*, 486 F.3d 815, 821 (4th Cir. 2007) ("This Court adopts the majority view of reviewing courts that unilateral notification of cancellation does not automatically void the loan contract."); *Yamamoto* v. *Bank of N.Y.*, 329 F.3d 1167, 1172 (9th Cir. 2003) (automatic rescission "makes no sense when ... the lender contests the ground upon which the borrower rescinds"); *Large* v. *Conseco Fin. Servicing Corp.*, 292 F.3d 49, 54 (1st Cir. 2002) (in a contested case, "mere assertion of the right of rescission" does not have "the automatic effect of voiding the contract"); *see also* Rohner & Miller, *Truth in Lending* 319 (Harrell ed., 2007 Supp.) ("[C]onsiderable case law indicates that the creditor, upon receiving a notice of rescission, is not required to immediately cancel its security interest and effectively become an unsecured creditor before it has an opportunity to be heard before a court.").

b. Section 1635(a) says nothing about how and when rescission is effectuated. Congress answered those questions in section 1635(b) and (g), where it created two rescissionary procedures for the borrower to pursue, depending on whether his right to rescind is disputed.

Where a borrower's right to rescind is uncontested, section 1635(b) sets forth the steps necessary to effectuate rescission. That provision makes clear that "rescission is a process involving two parties, each with their own obligations." *Iroanyah* v. *Bank of Am.*, 753 F.3d 686, 691 (7th Cir. 2014); *accord, e.g.*, *Yamamoto* v. *Bank of N.Y.*, 329 F.3d 1167, 1173 (9th Cir. 2003) ("rescission under § 1635(b) is an on-going process consisting of a number of steps"). A borrower's "exercise[]" of "his right to rescind" initiates this process, but rescission is achieved only when the transaction has been unwound and both parties have been restored to the *status quo ante*, under the steps prescribed in section 1635(b). *See, e.g.*, *Iroanyah*, 753 F.3d at 692 (where tender by the borrower "is impossible," "rescission, by *any* definition, has not taken place").[4]

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[4] The text of section 1635(b) distinguishes the "exercise[]" of the right to rescind from "rescission." *See In re Ramirez*, 329 B.R. 727, 735 (D. Kan. 2005) ("The plain language of the statute indicates that exercising the right to rescind is a discrete event; and rescission is a separate discrete event."); *see also Gilbert* v. *Residential Funding LLC*, 678 F.3d 271, 277 (4th Cir. 2012) ("We must not conflate the issue of whether a borrower has exercised her right to rescind with the issue of whether the rescission has, in fact, been completed and the contract voided."). The text provides that "[w]hen an obligor *exercises his right to rescind* ... , he is not liable for any finance or other charge," and it continues that, "any security interest given by the obligor ... becomes void *upon such a rescission*." 15 U.S.C. § 1635(b) (emphasis added); *see Beach*, 523 U.S. at 412 (security interest "'becomes void' upon

Where, as here, the existence of a borrower's right to rescind is contested, and thus the rescissionary steps set forth in section 1635(b) will not take place, TILA prescribes a different procedure: A borrower seeking rescission in a contested case must proceed to court and invoke the alleged right to rescind by suing for an award of rescission. Petitioners and the United States acknowledge that "[v]arious TILA provisions contemplate that a court may become involved in a rescission-related dispute" (U.S. Br. 8; *see* Pet. Br. 23), but they contend that a "court's task in such a suit is to decide whether the obligor *has already rescinded* the transaction by means of a notice" (U.S. Br. 8 (emphasis added)). That is wrong.

In section 1635(g)—a provision the CFPB considers "certainly not helpful" to its position (Arg. Recording 13:35-38, *Sherzer* v. *Homestar Mortg. Servs.*, No. 11-4254 (3d Cir. Sept. 19, 2012)), and a provision petitioners fail even to cite—Congress recognized the availability of an "action in which it is determined that a creditor has violated" section 1635. That, of course, is *the* precondition of any right to rescind more than three days beyond the loan closing. Congress also expressly provided in section 1635(g) that, in the action permitted thereunder, a court may "*award*" "rescission" as a remedy. 15 U.S.C. § 1635(g) (emphasis added); *see also*

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rescission"). Under petitioners' view, the statutory phrase "upon such a rescission," a phrase they ignore, would be superfluous. And mere notice itself—even if contested—would void the lender's security interest. But if Congress intended to equate exercise of the right to rescind with rescission itself, it would not have used different terms for the same event. *See, e.g.*, *Bailey* v. *United States*, 516 U.S. 137, 146 (1995) (assuming that when Congress "used two terms ... it intended each term to have a particular, nonsuperfluous meaning").

*Parker* v. *Potter*, 232 F. App'x 861, 865 (11th Cir. 2007) (per curiam) ("An action for rescission under § 1635 is a distinct cause of action[.]"); *Eby* v. *Reb Realty, Inc.*, 495 F.2d 646, 652 (9th Cir. 1974) (section 1635 provides a "form[] of relief" that a court may "grant"). Section 1640 likewise recognizes this action as one "in which a person *is determined to have a right of rescission under section 1635*." 15 U.S.C. § 1640(a)(3) (emphasis added); *see id.* § 1640(c) (recognizing "action brought under ... section 1635"); *id.* § 1640(g) (referencing "remedy permitted by section 1635").

Congress also legislated a rule to govern in that action. Section 1635(c) provides for a "rebuttable presumption" that a borrower who signs an acknowledgment of receipt in fact received the required disclosures. The only purpose of that presumption is to have effect in litigation, imposing on the party against whom it is directed—here, the borrower—"the burden of producing evidence to rebut the presumption." Fed. R. Evid. 301. And the presumption further strongly implies that when there has been an acknowledgement, a borrower's notice that asserts the contrary is not presumed to be valid.

Far from petitioners' claim that rescission is effectuated unilaterally and automatically upon notice, then, TILA requires that a borrower in a contested case sue for rescission. "If a lender disputes a borrower's purported right to rescind, the designated decision maker ... must decide whether the conditions for rescission have been met." *Large* v. *Conseco Fin. Servicing Corp.*, 292 F.3d 49, 55 (1st Cir. 2002). What "'rescinds' the transaction" is a court decision, if "the right to rescind is determined in the borrower's favor." *Yamamoto*, 329 F.3d at 1172. Unless and until that decision is made, a borrower has "only advanced a claim seeking

rescission." *Large*, 292 F.3d at 55. In sum, when the lender contests a borrower's right to rescind, that borrower must bring an "action in which [he] is determined to have a right of rescission under section 1635," 15 U.S.C. § 1640(a)(3), and in which the court may "award" "rescission," *id.* § 1635(g).

c. Petitioners cite (Br. 30) snippets of legislative history for the proposition that Congress "intended to create a simple, non-judicial rescission remedy ... without requiring burdensome litigation." Quoting Representative Sullivan in 1968, petitioners state: "'[w]hen the debtor gives notice of intention to rescind, that voids the mortgage absolutely and unconditionally regardless of whether either the debtor or the creditor does any of the things that [Section 1635] requires be done.'" *Id.* (alterations in original).

The context of Representative Sullivan's statement makes clear that she was referring to notice provided during the unconditional rescission period—before a lender "disburses funds."[5] To the extent petitioners rely on it to support the proposition that a contested notice "absolutely and unconditionally" voids a mortgage, not even their amici appear to agree. *See* New York et al. Br. 15 n.11 (consumer must assert a "*legitimate* right to rescind" (emphasis added)); *see also* 3 Black, *A Treatise on the Rescission of Contracts and Cancellation of Written Instruments* § 569, at 1403 (2d

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[5] 114 Cong. Rec. H4114, H4118 (May 22, 1968); *see also id.* (explaining that "[i]n this connection, ... a lender who disburses funds ... would ordinarily be taking a risk if he did so before the contract and all the required information had been in the hands of the debtor for three full business days," and noting that the right to rescind may be waived in "an emergency situation where the debtor really needs to have the money or performance right away").

ed. 1929) ("notice of rescission is not effectual for any purpose unless given at a time when the party has a clear right to rescind"). In any event, that extreme view—which would effectuate rescission even in the absence of tender by the consumer—is in conflict with the text of section 1635, which of course is "Congress's 'authoritative statement.'" *Chamber of Commerce of U.S.* v. *Whiting*, 131 S. Ct. 1968, 1980 (2011).

Petitioners also rely on a failed amendment from 1977 that would have permitted parties to "'bring an action to determine the right to rescind.'" Pet. Br. 26; *see id.* 29. This Court has repeatedly recognized that "'[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1173 n.16 (2014); *see, e.g.*, *Lockhart* v. *United States*, 546 U.S. 142, 147 (2005). In any event, three years later, Congress enacted amendments to TILA that largely accomplished what petitioners say Congress failed to enact in 1977. The 1980 amendments expressly recognize an action in which a court is asked to determine whether a borrower has a right of rescission, and in which the court may "award" "rescission." Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 612(a)(6), 94 Stat. 132, 176 ("[i]n any action in which *it is determined that a creditor has violated this section*" (emphasis added)); *see also id.* § 615(a)(2), 94 Stat. at 180 ("in any action in which a person is *determined to have a right of rescission under section 125*" (emphasis added)). And Congress did so amidst comments from the Federal Reserve Board that "there has been frequent resort to the courts to determine a consumer's right to rescind, and the various consequences of rescission." *Simplify and Reform the Truth in Lending Act: Hearing on S. 1312, S. 1501,*

*and S. 1653 Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Hous., & Urban Affairs*, 95th Cong. 56 (1977) (statement of Philip C. Jackson, Jr., Governor, Board of Governors of the Federal Reserve System). Far from showing that Congress intended to allow for unilateral and automatic rescission upon notice, the legislative history shows that Congress contemplated borrowers would need to sue for a rescission award in contested cases and provided the means for doing so.

### 2. The common law supports respondents' interpretation of rescission under TILA

The common law of rescission reinforces TILA's text and drafting history. A party seeking to rescind at common law may, depending upon the circumstances, proceed at law or in equity. In enacting a statutory rescission remedy, Congress plainly did not adopt rescission at law, whereby rescission is unilaterally effectuated only upon notice *and* tender. Instead, by separating notice in time and sequence from tender, and underscoring the need for judicial intervention to "award" "rescission" in the case of a dispute, Congress enacted a statutory remedy that much more closely resembles rescission in equity—one that is not effectuated unilaterally and automatically upon notice, but rather must be decreed by a court.

Petitioners and the United States acknowledge that Congress departed from rescission at law in enacting section 1635. Pet. Br. 32 n.4 (acknowledging "departure from the common law"); U.S. Br. 16 n.4 (acknowledging "some modifications" to rescission at law). They further acknowledge that equity informs actions to accomplish rescission under TILA. Pet. Br. 23;

U.S. Br. 30 n.7.[6] But, failing to engage with the consequences of these acknowledgements, they insist that Congress adopted a regime whereby "a party effectuates a rescission simply by notifying the non-rescinding party." Pet. Br. 13; *see* U.S. Br. 16 n.4. That contention is simply wrong.

As discussed, *supra* pp. 7-8, under rescission at law, the rescinding party must tender the benefits received under the contract for the transaction to be considered rescinded. 1 Dobbs, *Law of Remedies* § 4.8, at 673 (2d ed. 1993); 3 Black § 616, at 1483-1484; *see, e.g.*, *Smeltzer* v. *White*, 92 U.S. 390, 395-396 (1876); *Savers Fed. Sav. & Loan Ass'n of Little Rock* v. *First Fed. Sav. & Loan Ass'n of Harrison*, 768 S.W.2d 536, 538 (Ark. 1989). Contrary to what petitioners claim (Br. 13), in a rescission at law a party does *not* in fact "effecuate[] a rescission simply by notifying the non-rescinding party." Rather, it is "*the tender itself* [that] effectuates the rescission," after which the plaintiff is entitled to sue for restitution. *Brown* v. *Techdata Corp.*, 234 S.E.2d 787, 791 (Ga. 1977) (per curiam) (emphasis added); *see Savers Fed. Sav. & Loan Ass'n of Little Rock*, 768 S.W.2d at 538 ("Rescission at law is accomplished when one party to a contract tenders ... the benefits received under the contract."); *see also* 1 Dobbs § 4.8, at 673; 3 Black § 617, at 1485-1488. That sequence is grounded in principles

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[6] Courts are in accord. It has long been established that rescission under TILA, "[a]lthough ... statutorily granted," "remains an equitable doctrine subject to equitable considerations." *Brown* v. *National Permanent Fed. Sav. & Loan Ass'n*, 683 F.2d 444, 447 (D.C. Cir. 1982) (per curiam); *accord, e.g.*, *Lee* v. *Countrywide Home Loans, Inc.*, 692 F.3d 442, 451 n.2 (6th Cir. 2012) ("'rescission is an equitable remedy'"); *Hull* v. *Bowest Corp.*, 683 P.2d 1181, 1185 (Colo. 1984) (en banc) ("action to rescind under TILA is an equitable proceeding").

of fairness: Tender is required because "it would be unfair" to allow for unilaterally effective termination upon notice and "insist that the defendant give up what he got without any assurance of getting back what he gave." 1 Dobbs § 4.8, at 674; *see also* 17 Am. Jur. 2d *Contracts* § 512, at 995 (1964) ("One cannot have the benefits of rescission without assuming its burdens.").

"Rescission in equity is a very different matter." 1 Dobbs § 4.8, at 675. "[I]n equity, a person suing to rescind a contract, as a rule, is not required to restore the consideration at the very outset of the litigation." *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422, 426 (1998); *see* 1 Dobbs § 4.8, at 675. That is because, in equity, the "action does not proceed as *upon* a rescission, but proceeds *for* a rescission." *Gould* v. *Cayuga County Nat'l Bank*, 86 N.Y. 75, 83 (1881) (emphasis added). In other words, "it is not a suit based upon the rescission already accomplished by the plaintiff, but a suit to have the court decree a rescission." 1 Dobbs § 4.8, at 675.

The procedure for effectuating rescission under TILA differs markedly from the unilateral rescission-at-law regime and more closely resembles rescission in equity. First, in section 1635, by separating the notice of intention to rescind from the tender, Congress removed the traditional underpinnings of "unilateral" rescission: Absent a tender, the initial step taken by the borrower or buyer does not assure restoration of the status quo—the heart of rescission. Under section 1635(b), a borrower is not required to tender upon the sending of notice, but must ultimately do so as a prerequisite to accomplishing rescission. *See, e.g., Iroanyah*, 753 F.3d at 692 (absent tender, "rescission ... has not taken place"); *accord, e.g., McKenna* v. *First Horizon Home Loan Corp.*, 475 F.3d 418, 422 (1st Cir. 2007)

("rescission entails the return of loan proceeds to the creditor"); *see also* 75 Fed. Reg. 58,539, 58,547 (Sept. 24, 2010) ("The Board does not believe that Congress intended for the creditor to lose its status as a secured creditor if the consumer does not return the loan balance.").

Second, when contested, there is no rescission until a court grants a borrower that remedy: TILA's text expressly speaks of a court "award[ing]" "rescission," 15 U.S.C. § 1635(g), in the action that Congress created for a court to "determine[]" whether a borrower "ha[s] a right of rescission under section 1635," *id.* § 1640(a)(3); *see also id.* § 1640(c), (g). An action for an "award" of "rescission" under TILA is not, as in the case of a rescission at law, a suit for restitution based on a rescission already accomplished. Rather, it is a suit *for rescission*, and thus more closely resembles a rescission in equity, "'effected by the decree of the ... court which entertains the action for the express purpose of rescinding the contract and rendering a decree granting such relief." *Griggs* v. *E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 446 (4th Cir. 2004); *see also Phelps* v. *U.S. Life Credit Life Ins. Co.*, 984 S.W.2d 425, 427 (Ark. 1999) ("cancellation of an instrument" is "exclusively an equitable power"); 3 Black § 686, at 1635. Indeed, that is precisely what petitioners request as relief in their complaint here: "[r]escission of [the] transaction" (JA35), and cancellation of the security interest (JA33). *Compare* Pet. Br. 32 (in rescission at law, "'plaintiff effects the rescission, and the court gives a judgment for restitution'").

### B. Section 1635(f) Establishes An Uncompromising Three-Year Limit On The Time For Bringing A Suit For Rescission

1. Responding to concerns from federal regulators and others about the clouds on titles resulting from indefinite rescission rights, *see supra* pp. 12-13, Congress amended TILA in 1974 to put a definitive end to a borrower's ability to seek rescission. In an amendment titled, "Time limit for right of rescission," Congress categorically stated that a borrower's right of rescission "shall expire" three years after the consummation of the loan transaction. Pub. L. No. 93-495, § 405, 88 Stat. 1500, 1517 (1974), *as amended*, Pub. L. No. 96-221, § 612(a)(6), 94 Stat. at 176. That provision, codified at 15 U.S.C. § 1635(f), sets forth an absolute time limit after which any right of rescission ceases to exist. *See, e.g.*, *Black's Law Dictionary* 519 (5d ed. 1979) ("[e]xpiration" means "[c]essation; termination from mere lapse of time"); *Webster's Third New International Dictionary* 801 (1971) ("expire" means "become void through the passage of time").

Section 1635(f), by its plain terms, is a statute of repose.[7] It operates as "'a cutoff'"—an "'absolute ...

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[7] The CFPB has repeatedly conceded the point. *See* Arg. Recording 10:31-33, *Keiran* v. *Home Capital, Inc.*, Nos. 11-3878, 12-1053 (8th Cir. Oct. 16, 2012) (acknowledging that section 1635(f) "is a statute of repose"); Arg. Recording 12:27-30, *Sherzer*, No. 11-4254 (3d Cir. Sept. 19, 2012) (same). And the courts of appeals, even those in the minority of the circuit split here, are in accord. *See Keiran* v. *Home Capital, Inc.*, 720 F.3d 721, 727-728 (8th Cir. 2013); *Rosenfield* v. *HSBC Bank, USA*, 681 F.3d 1172, 1182-1183 (10th Cir. 2012); *McOmie-Gray* v. *Bank of Am. Home Loans*, 667 F.3d 1325, 1326 (9th Cir. 2012); *Sampson* v. *Washington Mut. Bank*, 453 F. App'x 863, 865 n.3 (11th Cir. 2011); *In re Community Bank of N. Va.*, 622 F.3d 275, 301 n.18 (3d Cir. 2010); *Jones* v. *Sax-*

bar' on a defendant's temporal liability." *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014) (alteration in original); *see id.* ("Statutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'"). Under a statute of repose, if an "'action is not brought within the specified period, the plaintiff literally has *no* cause of action.'" *Id.* at 2187 (quoting *Hargett* v. *Holland*, 447 S.E.2d 784, 787 (N.C. 1994)). Given Congress's concern with clouds on title, that was precisely the intended effect of section 1635(f). *See Beach*, 523 U.S. at 418-419 ("Since a statutory right of rescission could cloud a bank's title on foreclosure, Congress may well have chosen to circumscribe that risk[.]").[8]

As this Court unanimously confirmed in *Beach*, in enacting section 1635(f) Congress emphatically declared that the right of rescission shall not "'be enforceable in any event after the prescribed'" three-year period. 523 U.S. at 416; *see also Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946) ("If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter."). Section 1635(f) "'operates ... to extinguish the right which is the foundation

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*on Mortg., Inc.*, 537 F.3d 320, 327 (4th Cir. 1998); *Ramadan* v. *Chase Manhattan Corp.*, 156 F.3d 499, 505 (3d Cir. 1998).

[8] *Cf. Hanger* v. *Abbott*, 73 U.S. (6 Wall.) 532, 538 (1868) ("statutes of repose ... proceed ... upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period, and they take away all solid ground of complaint"); *Lewis* v. *Marshall*, 30 U.S. (5 Pet.) 470, 477 (1831) ("The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles. Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate.").

for the claim,'" *Beach*, 523 U.S. at 416—"thereby cutting off any rescission remedy," New York et al. Br. 11.

Section 1635(f) necessarily "limits ... the time for bringing a suit, by governing the life of the underlying right." *Beach*, 523 U.S. at 417. Congress provided for an action "in which a person is determined to have a *right of rescission* under section 1635." 15 U.S.C. § 1640(a)(3) (emphasis added); *see id.* § 1635(g). Congress also limited the time for bringing that action, providing plainly that the "obligor's *right of rescission* shall expire three years after the date of" closing. *Id.* § 1635(f) (emphasis added). Because petitioners filed their lawsuit for rescission after the end of this three-year repose period, their rescission claim is time-barred. "Done is done." *Jones* v. *Thomas*, 491 U.S. 376, 392 (1989) (Scalia, J., dissenting).

2. Ignoring the operative text of section 1635(f) and avoiding entirely the intended consequences of a statute of repose, petitioners rely on the subtitle of that provision that appears in the U.S. Code to argue that section 1635(f) limits only the time for sending notice of intention to rescind. Pet. Br. i; *see id.* 40. But that subtitle, "Time limit for exercise of right," is only a codifier's editorial revision and thus irrelevant. Congress never approved the subtitle; nor has Congress enacted Title 15 of the U.S. Code as positive law. *Cf. United States Nat'l Bank of Or.* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 n.3 (1993) ("When Congress has enacted a title of the Code as positive law ... , the text of the Code provides 'legal evidence of the laws.'"); *see also United States* v. *Dunham Concrete Prods., Inc.*, 475 F.2d 1241, 1244 n.1 (5th Cir. 1973) ("Congress has not enacted Title 15 of the United States Code into positive law, so the Statutes at Large take precedence over the codification."). This codifier's revision there-

fore "should be given no weight." *United States* v. *Welden*, 377 U.S. 95, 98 n.4 (1964).

That is particularly the case because, as noted, *supra* p. 13, Congress *did* provide a title for the amendment that gave rise to section 1635(f)—"Time limit for right of rescission"—a title that, unlike the editorial revision, is entirely consistent with the operative text.[9] Like the enactment's title, section 1635(f) says nothing about "exercising" a right of rescission—indeed, the word "exercise" appears nowhere in the text. The statute is directed to the right itself, and that right expires after three years. *See also Florida Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("subchapter heading cannot substitute for the operative text of the statute").

The Solicitor General's explanation (U.S. Br. 25) for why section 1635(f) operates only to "place[] an outer limit ... on ... the Section 1635(a) notification procedure," is similarly unpersuasive. Tellingly, as support for this assertion, the government cites *not* section 1635(f) but rather section 1635(b). *Id.* 21. The government also references two cases addressing statutes of repose that "set a deadline for performing some action other than initiation of a lawsuit." *Id.* 25-26 (citing *Balam-Chuc* v. *Mukasey*, 547 F.3d 1044, 1049 (9th Cir. 2008); *Iacono* v. *OPM*, 974 F.2d 1326, 1328 (Fed. Cir. 1992)). The statutes at issue in those two cases are readily distinguishable. Both expressly identify (1) a

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[9] The regulation promulgated by the Federal Reserve Board shortly after the enactment of section 1635(f) is also inconsistent with petitioners' position (and the editorial revision), making no reference at all to the "exercise" of the right of rescission. *See* 40 Fed. Reg. 30,085, 30,086 (July 17, 1975) (adding 12 C.F.R. § 226.9(h), *"Time limit for unexpired right of rescission"*).

deadline *and* (2) the specific action that a party must take by that deadline. *See* 8 U.S.C. § 1255(i) (alien must "*file[]*" petition by April 30, 2001 (emphasis added)), *discussed in Balam-Chuc*, 547 F.3d at 1049; 5 U.S.C. § 8341 note (1988) (spouse must "'*file[]* an application ... on or before May 7, 1989'" (emphasis added)), *discussed in Iacono*, 974 F.2d at 1327; *see also* N.Y. U.C.C. Law § 4-A-505 ("customer" must "*notif[y]* the bank of the customer's objection to the payment within one year" (emphasis added)), *discussed in Ma* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 88-89 (2d Cir. 2010). In contrast, section 1635(f) states, simply and categorically, that the right of rescission "shall expire" at the end of three years. Like petitioners, the government reads into the statute words that are not there.

## II. PETITIONERS' INTERPRETATION WOULD THWART CONGRESS'S PURPOSE IN ENACTING THE REPOSE PROVISION

A. Petitioners acknowledge (Br. 39), almost as an afterthought, that "it is useful to understand" section 1635(f), but only insofar as they contend it does not govern the time for filing suit. What that time limit is, petitioners and their amici say (*id.*; New York et al. Br. 8 n.7), the Court need not figure out—even though it is *the question* that has divided the lower courts. If the Court is interested in that dispositive issue, petitioners advise (Br. 43-45), it should borrow from the one-year limitations period found in section 1640(e) or from state statutes of limitations.

Petitioners' suggestion would sow uncertainty where Congress intended repose. It is fanciful to suggest that, after creating an extraordinary remedy and then enacting an uncompromising limitation on the sub-

stantive right to that remedy, Congress meant to leave indeterminate the time for seeking an award of that remedy.

Section 1640 applies to claims for damages, not claims for rescission. The CFPB's tepid support in the lower courts for section 1640's limitations period applying here is telling. *See, e.g.*, CFPB Amicus Br. 26 n.6, *Sherzer*, No. 11-4254 (3d Cir. Apr. 13, 2012) (taking no position on the issue and noting only that there is "some support" for this proposition "in the legislative history"). And in *Beach*, 523 U.S. at 418, this Court recognized the "stark contrast" between the "1-year limitation provision on damages actions" in section 1640(e) and the "treatment of rescission" in the "uncompromising provision of § 1635(f)."

The alternative suggestion that Congress intended the uncertainty of a patchwork of 50 States' statutes of limitations, as interpreted by various courts, is also inconsistent with the statutory plan. Congress was fastidious about setting the precise timeframe for virtually every step in the rescissionary process. *E.g.*, 15 U.S.C. § 1635(a) ("obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction"); *id.* § 1635(b) (creditor shall act "[w]ithin 20 days after receipt of a notice of rescission"); *id.* (unless creditor takes possession "within 20 days after tender," ownership vests with borrower); *id.* § 1635(f) (if agency institutes formal proceeding, three-year repose period extended until "the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later"). But as petitioners would have it, that same Congress left the ultimate issue—the time for suing for an award

of rescission—open to the vagaries of state law.[10] To have a statute of repose in this context that speaks only to the timing for a notice of intention to rescind—leaving litigation of rescission claims wholly unaddressed—would "run counter to the commercial-certainty concerns of Congress ... that led Congress to establish the fixed and limited repose period of § 1635(f) in the first place." *Rosenfield* v. *HSBC Bank, USA*, 681 F.3d 1172, 1187 (10th Cir. 2012).

B. Petitioners say (Br. 33) that requiring borrowers to file suit to accomplish rescission in contested cases would result in "thousands of needless lawsuits." Quite to the contrary, it is petitioners' interpretation that would proliferate unnecessary litigation. If a borrower need only notify his lender of his intention to rescind in order unilaterally to accomplish rescission, then the lender's claim to title becomes fraught with uncertainty: Once the borrower has put down a placeholder—such that, in petitioners' words, he has indefinitely "retained the right of rescission" (JA33)—will the borrower ever actually sue for an award of rescission? Unless the lender is willing to operate with a cloud on its title, in the form of some possible lawsuit at some distant point in the future—up to nine years after closing in Minnesota, on petitioners' view (Br. 44)—the lender's only option is to file a declaratory judgment suit, even if the borrower's notice is patently meritless.

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[10] As petitioners' amici note (New York et al. Br. 18), "[m]any state statutes provide no limitation on consumers' right to cancel so long as the seller fails to provide proper disclosures." Petitioners' interpretation therefore leads to the further potential complication of divining what statute of limitation, if any, applies in States that provide no limitation for their state TILA analog.

Petitioners and their amici say that mere notice of intention to rescind is sufficient to "eliminate[] any commercial uncertainty to the same extent as a lawsuit." Pet. Br. 33; *see* U.S. Br. 28; New York et al. Br. 10. That is plainly wrong. Unilaterally asserting a contested right increases, rather than reduces, commercial uncertainty. "Sending written notice ... presents far fewer burdens" than filing a lawsuit. New York et al. Br. 22. Indeed, sending a written notice—a costless act to the borrower that falls outside the requirements of the Federal Rules of Civil Procedure (including requirements for formal service and Rule 11's prohibition on frivolous filings)—presents no burdens whatsoever. It is a no-lose proposition for a borrower to send a lender a notice of intention to rescind, even if the borrower has previously expressly acknowledged receiving his disclosures, as petitioners did here. And it is a particularly attractive option for homeowners who are in default or facing foreclosure, as it would provide, as they see it, immediate relief from their duties under the mortgage.[11]

Under petitioners' interpretation, then, lenders—holding in one hand an acknowledgement of receipt of disclosures (with the rebuttable presumption it carries) and in the other hand a notice of intention to rescind premised on exactly the opposite proposition—will have no choice but to sue or else face an extended cloud on title. But as TILA shows, Congress did not intend for the *lender* to sue for a declaratory judgment

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[11] This has not escaped the attention of the foreclosure bar. For example, the Foreclosure Defense Resource Center advertises that "TILA [r]escission" "may be your most potent weapon to combat foreclosure!" Foreclosure Defense Resource Center, *TILA Rescission*, http://www.foreclosuredefenseresourcecenter.com/foreclosure-defense-strategies/truth-in-lending-rescission/ (last visited Sept. 16, 2014).

or suffer a cloud on its title when it is the *borrower* who is claiming a "violat[ion]" of section 1635 and seeking an "award" of "rescission." 15 U.S.C. § 1635(g); *see id.* § 1640(a)(3); *see also Keiran* v. *Home Capital, Inc.*, 720 F.3d 721, 728 (8th Cir. 2013) (rejecting argument that "the bank, rather than the obligor, should be required to file suit to essentially prevent rescission"), *petition for cert. filed*, No. 13-705 (U.S. Dec. 9, 2013). A suit for rescission must be brought by the party seeking that remedy—the borrower.

Requiring a borrower to file suit ensures that no litigation will commence unless the borrower—the one claiming the violation of TILA—is properly confident of his assertion about the lender's violation and is prepared to prove it in court. *Cf. Crawford-El* v. *Britton*, 523 U.S. 574, 600 (1998) ("Rule 11 ... authorizes sanctions for the filing of papers that are frivolous [or] lacking in factual support[.]"). Requiring the commencement of litigation does not, as petitioners' amici claim (New York et al. Br. 13-14), "simply move[] the dispute over TILA rescission into court." Rather, it works to ensure discipline such that fewer cases reach the courts and, when they do, that there is a non-frivolous basis for invoking courts' jurisdiction to adjudicate meritorious claims.

C. Finally, petitioners' interpretation is also inequitable and thus inconsistent "with the general goal and application of a rescission remedy." *Rosenfield*, 681 F.3d at 1185. Rescission under TILA is an equitable remedy, *see supra* pp. 28-29 & n.6, and "the primary justification of rescission" is that of "'remedial economy,' not ... the compensatory goal of a damages award," *Rosenfield*, 681 F.3d at 1184. "Consequently, it is not an appropriate remedy in circumstances where its application would lead to prohibitively difficult (or

impossible) enforcement." *Id.*; *see Keiran*, 720 F.3d at 727-728.

Under petitioners' approach, a borrower's notice within three years is all that is required to void a lender's security interest, instantly reducing the lender to an unsecured creditor. Yet a lawsuit to adjudicate the right to rescission *vel non* can come many years later. Unraveling a mortgage transaction three years after the fact is difficult enough; extending that period for an additional six years (petitioners' proposal (Br. 44) borrowing from Minnesota law) on the mere sending of notice indicating a borrower's intention to rescind would be, to say the least, "costly and difficult," given that "the underlying circumstances in no small number of cases are likely to have changed significantly," *Rosenfield*, 681 F.3d at 1185; *see Hartman*, 734 F.3d at 759-760.

## III. The Remaining Arguments Of Petitioners And Their Amici Lack Merit

A. The Solicitor General contends that respondents' interpretation of section 1635(f) "creates a substantial danger that a borrower's cause of action for an alleged violation of Section 1635(b) may become time-barred before it accrues." U.S. Br. 24; *see also* Pet. Br. 45-46. As the government sees it, if a borrower gives notice to the creditor just before the three-year window expires, he will not know immediately whether the creditor will in fact unwind the transaction in accordance with the statute; and until the creditor's 20-day window for unwinding the transaction expires, the borrower will ordinarily have no sound basis for alleging that the creditor has violated section 1635(b).

This argument is unpersuasive. First, Congress has already addressed and rejected this concern by enacting a statute of repose. "The statute of repose limit is 'not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered.'" *CTS Corp.*, 134 S. Ct. at 2182.

Second, as the government acknowledges, the borrower could easily avoid this result by sending his notice more than 20 days before the three-year period expires. U.S. Br. 24. And, should there be any question near the end of the "already-generous three-year repose period," *Rosenfield*, 681 F.3d at 1187, about the lender's position, the borrower can simply file a protective suit, *cf. Saylor ex rel. Saylor* v. *Dyniewski*, 836 F.2d 341, 345 (7th Cir. 1988) ("'[e]lementary prudence' should have prompted plaintiffs' lawyer to file a protective suit" (alteration in original)), *superseded on other grounds by* 735 Ill. Comp. Stat. 5/2-209.

B. According to the Solicitor General, respondents "suggest" that "a favorable judicial ruling is an essential prerequisite to the borrower's actual exercise of his right of rescission," such that "even the borrower's filing of suit within three years of the transaction would not satisfy Section 1635(f)." U.S. Br. 24.

That is certainly not respondents' position; nor have they ever made that "suggest[ion]." Respondents' position is simple: It is the "*obligor's* right of rescission" that expires. 15 U.S.C. § 1635(f) (emphasis added). When rescission is contested, the obligor (*i.e.*, borrower) invoking that remedy must sue before his right of rescission expires under section 1635(f). That is an

unexceptional proposition that holds true for statutes of repose more generally.[12]

## IV. No Deference Is Due The CFPB's Litigation Views

For the reasons set forth above, TILA forecloses petitioners' view that a borrower in a contested case need only notify his lender of his intention to rescind within the three-year statute of repose. "[T]hat is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Negusie* v. *Holder*, 555 U.S. 511, 542 (2009) (internal quotation marks omitted).

Even were the Act ambiguous, no deference would be due the CFPB.

First, Regulation Z provides no clarity on the relevant statutory interpretation issue here—as the Bureau conceded in the lower courts. CFPB Letter 2, *Sherzer*, No. 11-4254 (3d Cir. Sept. 17, 2012). The regulation says nothing about what a borrower must do to obtain resolution of a contested assertion of rescission, and by when the borrower must do it. *See id.*; *see also Keiran*, 720 F.3d at 728 ("while Regulation Z sets forth one of the things that an obligor must do to rescind the loan—give written notice to the bank—it does not set forth the entirety of things necessary to accomplish *rescission*" (emphasis added)).

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[12] The notion that a timely brought cause of action "must be dismissed" as a result of judicial inaction post-dating the expiration of the statute of repose is fanciful. Tellingly, while the United States raises the prospect (U.S. Br. 24-25), it cites nothing to suggest that this possibility has ever been countenanced—in any context.

In the lower courts the Bureau argued for deference on the basis of the "considered view" expressed in its amicus briefs. CFPB Letter 2. But those briefs simply vouch for the Bureau's regulation, and that regulation, at best, only parrots the statute. Consequently, the Court's decision in *Auer* v. *Robbins*, 519 U.S. 452 (1997), and "the standard of deference it accords to an agency are inapplicable here." *Gonzales* v. *Oregon*, 546 U.S. 243, 256 (2006); *see id.* at 257 ("An agency does not acquire special authority to interpret its own words, when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."); *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 882 (2011) ("no deference [is] warranted to an agency interpretation of what [are], in fact, Congress' words").

All that remains for the Bureau, accordingly, is a claim for deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *See* CFPB Letter 3. But the Bureau's view "lack[s] the persuasive force that is a necessary precondition to deference under *Skidmore*," *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2533 (2013), and ought to be rejected.

The CFPB fails to provide any explanation consistent with TILA's text for why rescission in a contested case is complete and instantaneously effective upon notice. To the contrary, the Bureau has conceded that section 1635(g) is "certainly not helpful" to its position. Arg. Recording 13:35-38, *Sherzer*, No. 11-4254 (3d Cir. Sept. 12, 2012). And the Bureau has never reconciled its position with the common law of rescission. Despite acknowledging that section 1635 "reflects 'a reordering of common law rules governing rescission'" (CFPB *Sherzer* Amicus Br. 16 n.3; *see* U.S. Br. 16 n.4), the Bureau never grapples with the consequences of

that reordering or with the significant factors pointing directly toward a scheme resembling the equitable model of rescission.

Finally, the Bureau has never purported to base its view on any special expertise that bears on the issue here. Indeed, the Bureau says nothing, based on any expertise in general or more specifically regarding how rescission disputes arise in the real world, about why its reading reasonably conforms to Congress's objectives in enacting the statute of repose set forth in section 1635(f). *See Gonzales*, 546 U.S. at 269 ("lack of expertise" tempers claim of deference); *see also City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring in part and concurring in judgment) ("agency interpretation, in light of the agency's special expertise" may have "'power to persuade'"). The CFPB's unpersuasive view, like that of petitioners, disregards important features of TILA's text and Congress's intent, vitiating the certainty of title Congress sought to ensure through the enactment of section 1635(f).

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2014

# REPLY BRIEF

RECORD AND BRIEFS

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IN THE
# Supreme Court of the United States

LARRY D. JESINOSKI AND CHERYLE JESINOSKI, INDIVIDUALS,
*Petitioners*,

v.

COUNTRYWIDE HOME LOANS, INC., SUBSIDIARY OF BANK OF AMERICA N.A., D/B/A AMERICA'S WHOLESALE LENDER, ET AL.,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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Section 1635(a) provides a "right to rescind" certain home mortgages "by notifying the creditor." 15 U.S.C. § 1635(a). The provision's plain meaning provides the mechanism for the borrower's exercise of the right of rescission. That mechanism is notification, not the filing of a lawsuit. The surrounding provisions support that straightforward reading of Section 1635(a)'s text. Section 1635(b) scripts a set of procedures to implement that rescission without litigation. Section 1635(f), which provides that the "right of rescission shall expire three years after . . . the transaction," *id.* § 1635(f), speaks only of the rescission right's duration and not of a deadline for filing a lawsuit to vindicate a timely exercised right. That interpretation preserves the efficient and effective mechanism Congress enacted to provide a simple remedy to protect homeowners while ensuring commercial certainty by requiring that the right be exercised within three years.

Respondents' countervailing interpretation adds words and concepts to the statute that Congress neither enacted nor intended. Respondents assert that Congress intended for borrowers to file suit to effectuate the rescission right within three years if – but only if – the creditor "disputes" the rescission. No words in Section 1635's text support that interpretation, which is directly contrary to the text's instruction that "notifying the creditor" is the means to exercise the right to rescind. That theory also imposes an atextual limitation on the applicability of Section 1635(b)'s procedures, which by their terms do not depend on whether the creditor "contests" the rescission. And it converts Section 1635(f), which "says nothing in terms of bringing an action," *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998), into an absolute bar on suits to enforce rescissions even

when the borrower timely has exercised the right to rescind through written notice.

The two agencies charged with administering this provision of the Act since its enactment – the Federal Reserve Bank and the Consumer Financial Protection Bureau – consistently have construed Section 1635(a) for more than four decades to provide that a borrower may rescind the transaction through written notice to the lender. That longstanding interpretation warrants deference.

## ARGUMENT

### I. A BORROWER EXERCISES THE RIGHT TO RESCIND UNDER SECTION 1635(a) BY NOTIFYING THE CREDITOR WITHIN THREE YEARS OF THE TRANSACTION

#### A. The Text And Structure Of Section 1635 Establish That A Borrower Rescinds By Notifying The Creditor

1. Section 1635(a) provides that the borrower "shall have the right to rescind . . . *by notifying* the creditor." 15 U.S.C. § 1635(a) (emphasis added). The statutory text thus refutes respondents' contention that it "says nothing about how and when rescission is effectuated." Br. 23. Respondents concede that a borrower "*must* 'notify[]' the lender," Br. 22 (emphasis added; alteration in original), but misconstrue Section 1635(a) by ignoring a word – "by" – essential to its meaning.

Congress used the word "by" to specify the means by which the borrower exercises "the right to rescind." The preposition "by" followed by the gerund form of a verb indicates the means or method by which a task is performed. *See* Rodney Huddleston & Geoffrey Pullum, *The Cambridge Grammar of the English Language* 673 (2002) ("Means . . . adjuncts

are characteristically realized by [preposition phrases] headed by *by*"). For example, in the sentence "Adam gets to work by walking down 16th Street," the phrase "by walking" indicates the means by which Adam commutes to work. Congress then simplified the method for rescinding through notice by requiring creditors to "provide . . . appropriate forms for the [borrower] to exercise [the] right to rescind." 15 U.S.C. § 1635(a).

Relevant dictionary definitions of the word "by" confirm that straightforward interpretation. "The pertinent dictionary definitions of 'by' are 'through the means or instrumentality of[;] . . . through the direct agency of[;] . . . through the medium of[;] . . . through the work or operation of." *Bayer AG v. Housey Pharms., Inc.*, 340 F.3d 1367, 1378 (Fed. Cir. 2003) (quoting *Webster's Third New International Dictionary* 307 (1968)) (alterations in original); *see Webster's New International Dictionary* 367 (2d ed. 1952) (defining "by" as "through the medium of; . . . through the means of"); *Black's Law Dictionary* 251 (4th ed. 1968) (defining "by" as "[t]hrough the means, act, agency or instrumentality of").

Adjoining provisions of the Act similarly use the word "by" followed by a gerund to indicate a means of achieving an end. *See, e.g.*, 15 U.S.C. § 1637(c)(2)(B)(iii) ("the consumer elects to accept the card or account *by using* the card") (emphasis added); *id.* § 1637(c)(3)(C)(i)(II) ("the applicant may contact the creditor . . . *by calling* a toll free telephone number or *by writing* to an address") (emphases added); *id.* § 1637a(b)(2)(B) ("The disclosures required . . . shall be conspicuously segregated . . . *by grouping* the disclosures separately . . . or *by providing* the disclosures on a separate form") (emphases added).

In accord with that plain meaning, Congress elsewhere used the phrase "by notifying" in identical fashion to establish the means by which a consumer may exercise a statutory right to cancel a contract. The Credit Repair Organizations Act of 1996 provides that "[a]ny consumer may cancel any contract with any credit repair organization . . . *by notifying* the credit repair organization of the consumer's intention to do so." 15 U.S.C. § 1679e(a) (emphasis added). Congress removed any doubt that the consumer need only send notice – and need not also file a lawsuit – to exercise that right by requiring those organizations to provide a form stating, "'[t]o cancel this contract, mail or deliver a signed, dated copy of this cancellation notice.'" *Id.* § 1679e(b). Congress's use of the phrase "by notifying" to denote the means of exercising a cancellation right in the 1996 Act merely mimicked the mechanism already established in Section 1635(a) nearly 30 years earlier.[1]

Section 1635(b) confirms that the phrase "by notifying the creditor" specifies the means for rescinding. That provision scripts a detailed series of steps to implement the rescission once notice is given, without mentioning (much less requiring) that the borrower file a lawsuit. *See* Pet. Br. 20-21. It provides that, "[w]hen [a borrower] *exercises* [the]

---

[1] Congress has used the phrase "by notifying" to convey that meaning in dozens of other statutes. *See, e.g.*, 15 U.S.C. § 1693e(a) ("[a] consumer may stop payment of a preauthorized electronic fund transfer by notifying the financial institution orally or in writing"); 25 U.S.C. § 4026 ("any Indian tribe which has withdrawn trust funds may choose to return any or all of the trust funds such tribe has withdrawn by notifying the Secretary in writing"); 38 U.S.C. § 1562(g)(1) ("A person who is entitled to special pension . . . may elect not to receive special pension by notifying the Secretary of such election in writing.").

*right to rescind* under [Section 1635(a)], he is not liable for any finance or other charge" and "any security interest . . . becomes void upon *such a rescission*." 15 U.S.C. § 1635(b) (emphases added). The phrase "upon such a rescission" refers to the "exercise[] [of the] right to rescind." The creditor's obligation to return the borrower's downpayment is in turn expressly triggered by "receipt of a notice of rescission," not by the filing of a lawsuit. *Id.* The consumer therefore rescinds the mortgage when the right is "exercise[d] . . . under" Section 1635(a) by sending "a notice of rescission." *Id.*

**2.** Section 1635's text provides no support for respondents' proffered distinction in the method for exercising the right to rescind between "contested" and "uncontested" rescissions. *Cf.* Resp. Br. 24. Section 1635(a) establishes a single method for exercising the right through the phrase "by notifying the creditor" and is completely silent about whether the rescission subsequently is "contested." *See* Pet. Br. 19. The textual mechanism for effectuating the rescission right simply does not "create[] two rescissionary procedures for the borrower to pursue, depending on whether his right to rescind is disputed." Resp. Br. 23; *see Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2769 (2014) ("'To give th[e] same words a different meaning for each category would be to invent a statute rather than interpret one.'") (quoting *Clark v. Martinez*, 543 U.S. 371, 378 (2005)) (alteration in original).

Nor does Section 1635(b) support respondents' position. Respondents err (at 24) in speculating that, "[w]here, as here, the existence of a borrower's right to rescind is contested, . . . the rescissionary steps set forth in section 1635(b) will not take place." Section

1635(b) contains no such limitation. Congress would not carefully craft a meticulous procedure to implement rescissions, detailing each step in the process, only to fail to mention that those procedures do not apply in a significant range of circumstances. *See Bates v. United States*, 522 U.S. 23, 29 (1997) (the Court will "ordinarily resist reading words or elements into a statute that do not appear on its face"). Because Section 1635(b)'s non-judicial procedures apply to all rescissions – "contested" or not – respondents ask this Court to engraft onto Section 1635 a sometimes-applicable requirement that a borrower file a lawsuit to exercise the right to rescind.

The final sentence of Section 1635(b) further undermines respondents' interpretation by providing that "[t]he procedures prescribed by this subsection shall apply except when otherwise ordered by a court." 15 U.S.C. § 1635(b). Congress added that sentence in 1980 to reaffirm the equitable powers of courts in separate legal proceedings – such as declaratory judgment actions, judicial foreclosures, or bankruptcy proceedings – to alter Section 1635(b)'s procedures. *See* Pet. Br. 23-24. By specifying that those procedures "*shall* apply except when otherwise ordered by a *court*," Section 1635(b) refutes respondents' claim that the creditor's unilateral refusal to honor a rescission renders those procedures inapplicable. (Emphases added.)

Section 1635(g), on which respondents principally rely to infer their proposed distinction, neither creates a cause of action nor imposes a requirement that borrowers sue in order to exercise the right to rescind. That section – which respondents never quote in full – provides that, "[i]n *any action* in which it is determined that a creditor has violated this

section, in addition to rescission the court may award relief under section 1640 of this title not relating to the right to rescind." 15 U.S.C. § 1635(g) (emphasis added); *see also id.* § 1640(a)(3) (granting costs and attorney's fees "in *any action* in which a person is determined to have a right of rescission") (emphasis added). By using the phrase "any action," Section 1635(g) recognizes other legal proceedings that may implicate the right to rescind. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one of some indiscriminately of whatever kind.'") (quoting *Webster's Third New International Dictionary* 97 (1976)). Section 1635(g) thus preserves the authority of a court in such a proceeding to award damages under Section 1640. *See* S. Rep. No. 96-368, at 29 (1979) (Section 1635(g) "explicitly provides that a consumer who exercises his right to rescind may also bring suit under the Act for other violations not relating to rescission"), *reprinted in* 1980 U.S.C.C.A.N. 236, 265. It is implausible that Congress meant to create implicitly a cause of action for rescission merely by referring to other proceedings, especially when it rejected an amendment that would have done so expressly just three years earlier. *See* Pet. Br. 22-23.

Respondents overread Section 1635(g) in asserting that it "prescribes" that a "borrower seeking rescission in a contested case *must* proceed to court and invoke the alleged right to rescind by suing for an award of rescission." Br. 24 (emphasis added). Section 1635(g) does not alter Section 1635(a)'s express terms by implicitly requiring a lawsuit to exercise the right to rescind. Once a borrower notifies the creditor and thereby rescinds the transaction, a creditor might (as here) refuse to comply with the statutory procedures outlined in Section

1635(b). A borrower may then (as here) bring suit simply to enforce the rescission that already was effectuated by notice. *See* U.S. Br. 15-16 ("The court's role . . . is to determine whether the borrower has *already* rescinded the transaction through the (extra-judicial) means specified in the statute."). Accordingly, the Act's recognition of legal proceedings in which a court might "award relief" "in addition to rescission," 15 U.S.C. § 1635(g), or "determine[]" that a borrower "ha[s] a right of rescission," *id.* § 1640(a)(3), does not graft onto the statute a requirement – in conflict with Section 1635(a)'s explicit terms – that the borrower file a lawsuit to exercise that right. *See Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions").

**3.** The right of rescission Congress codified in Section 1635 comports with the non-judicial common-law remedy of rescission at law. *See* Pet. Br. 31-33; U.S. Br. 16 n.4. Under rescission at law, a party "is entitled to rescind by declaring the transaction rescinded." 1 Dan B. Dobbs, *Law of Remedies* § 4.3(6), at 616 (2d ed. 1993). Section 1635(a) conforms to that principle by providing a "right to rescind . . . by notifying the creditor."

In accord with the common law, Section 1635(b) "provide[s] for restoration of the status quo by requiring the [borrower] to return what he received from the [creditor]," *Pinter v. Dahl*, 486 U.S. 622, 641 n.18 (1988), here once the creditor satisfies its obligations. Congress expressly altered the common-law ordering of when a rescinding borrower must tender the proceeds of the loan to the creditor. *See* Pet. Br. 32 n.4;

15 U.S.C. § 1635(b) ("[u]pon the performance of the creditor's obligations . . . , the [borrower] shall tender the property to the creditor"); 1 Dobbs § 4.8, at 677 (citing 15 U.S.C. § 1635(b)). Congress thereby "sp[oke] directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (internal quotation marks omitted). In so doing, it carefully balanced the equitable considerations in ensuring homeowners' access to the rescission remedy and in safeguarding creditors' security interest.

Congress's reordering of the common-law tender rules was particularly sensible in the context of the rescission of mortgages. By terminating the lender's security interest in the property prior to requiring the borrower to tender, Section 1635(b) allows the borrower to secure another mortgage, to sell the house, or to offer the house itself as a substitute tender to the creditor. Absent that reordering, many borrowers would be unable to raise sufficient funds to tender the amount of the loan – which is often the largest financial obligation they will ever undertake – and therefore would be unable to rescind a mortgage no matter how egregious the creditor's violation of the Act. The reordering thus facilitates an orderly and equitable non-judicial process of rescission.

Respondents err in arguing (at 28) that "Congress enacted a statutory remedy that much more closely resembles rescission in equity," under which a rescission "must be decreed by a court." Both asserted grounds for that position are mistaken. *First*, respondents claim that, "when contested, there is no rescission until a court grants a borrower that remedy" because the statute "expressly speaks of a court 'award[ing]' 'rescission.'" Br. 31 (quoting

15 U.S.C. § 1635(g)) (alteration in original). But, as explained above, Section 1635(g) does not alter Section 1635(a) to require a borrower to file suit to exercise the right to rescind. Rather, Section 1635(a) requires only that a borrower "notify[] the creditor" – a requirement that mirrors rescission at law. A subsequent lawsuit enforces the rescission that was already effectuated by notice, which also accords with the common-law rule for rescission at law. *See* U.S. Br. 14-17. The fact that court proceedings may arise to enforce a rescission that was already accomplished by notice under Section 1635(a) thus comports both with the text of Section 1635 and with the common-law remedy of rescission at law. *See* 1 Dobbs § 4.3(6), at 616; Brooks Br. 11 ("In practice, the court's discretion to decree or deny rescission arises both in cases at law and cases in equity.").

*Second*, respondents erroneously suggest (at 30) that, "by separating the notice of intention to rescind from the tender, Congress removed the traditional underpinnings of 'unilateral' rescission." Respondents both overstate the uniformity of those "traditional underpinnings" and draw the wrong conclusion from Congress's reordering of the tender rules. As an initial matter, tender requirements at common law were not as rigid and uncompromising as respondents suggest. *See* Brooks Br. 12 (recognizing "exceptions" to tender rule where "a party could complete the rescission merely by having proper legal grounds and giving notice"). When Section 1635(a) was enacted, the relaxation of tender rules was already long recognized and applied where statutory procedures, such as those in Section 1635(b), protected the interests of both parties. *See* Restatement (First) of Restitution § 65 cmt. d (1937) ("[I]n proceedings at

law in which by statute or otherwise a conditional decree can be rendered, there need be no offer to restore antecedent to the proceedings. The mutual restoration can be accomplished by the decree."). Accordingly, the modern view "explicitly eliminates previous requirements that the claimant tender restitution to the other party as a precondition of rescission." Restatement (Third) of Restitution and Unjust Enrichment § 54 cmt. j (2011).

Moreover, it is implausible that Congress codified rescission at equity, thereby requiring a borrower to file a lawsuit to exercise the right to rescind, simply by "separating notice in time and sequence from tender." Resp. Br. 28. On respondents' view, by altering the order of tendering at common law, Congress codified rescission at equity and thereby silently required a lawsuit to rescind, notwithstanding Section 1635(a)'s express statement that a borrower rescinds "by notifying the creditor." Respondents' interpretation has the additional anomalous implication that, by requiring only notice for uncontested rescissions but mandating a lawsuit for contested rescissions, in a single sentence of Section 1635(a) Congress codified rescission at law for some cases but rescission in equity for other cases – without using any words to do so. The more plausible interpretation is that Congress codified rescission at law for all rescissions by explicitly specifying notice as the method for exercising the right to rescind while expressly reordering the tendering back of benefits to make rescission workable in the unique context of home mortgages.

4. Section 1635(f) does not require a borrower to file a lawsuit within three years. *See* Pet. Br. 40-43. That section provides that "[a] [borrower's] right

of rescission shall expire three years after the date of consummation of the transaction." 15 U.S.C. § 1635(f). As this Court recognized, Section 1635(f) "says nothing in terms of bringing an action." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998). All Section 1635(f) requires is that a borrower exercise the right to rescind – however the statute requires that rescission be exercised – within three years of the consummation of the transaction. The only question is what a borrower must do before that three-year period lapses. Section 1635(a) provides the answer: the borrower must "notify[] the creditor."

Respondents' contrary position relies heavily (at 32-36) on mischaracterizing Section 1635(f), which "talks not of a suit's commencement but of a right's duration." *Beach*, 523 U.S. at 417. Unlike time bars that speak directly and explicitly to a limitation on the initiation of litigation, Section 1635(f) does not mention lawsuits at all. *Compare CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2181 (2014) ("North Carolina's statute of repose" provides that "'[n]o cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action'") (citation omitted); *Merck & Co. v. Reynolds*, 559 U.S. 633, 650 (2010) ("an unqualified bar on actions instituted '5 years after such violation' [gives] total repose") (quoting 28 U.S.C. § 1658(b)(2) ("[A] private right of action . . . may be brought not later than . . . 5 years after such violation.")); *see also* U.S. Br. 26 ("When Congress wishes to limit the time for filing suit by means of a statute of repose, it does so expressly."); *cf. Beach*, 523 U.S. at 416 (recognizing it "is apparent from the plain language" of Section 1635 that it is not "a statute of limitation").

Reading Section 1635(f) as a traditional time bar to litigation is especially anomalous where the borrower previously exercised the right to rescind within the three-year period. Once the borrower has exercised the right by notifying the creditor, Section 1635(f) is simply inapplicable and the lapse of its time period is irrelevant. To hold otherwise would lead to untenable and unintended consequences. Under respondents' apparent view, Section 1635(f) terminates the rescission right even after a borrower had already exercised it if the borrower does not bring a lawsuit within the provision's three-year period because "only a court may 'award' 'rescission.'" Br. 22 (quoting 15 U.S.C. § 1635(g); *id.* § 1640(a)(3)); *see id.* at 31 ("when contested, there is no rescission until a court grants a borrower that remedy") (citing 15 U.S.C. § 1635(g)). Respondents' interpretation thus leads to the bizarre result that a timely filed lawsuit seeking to enforce the rescission right could "expire" while the suit awaits judicial resolution. *See* U.S. Br. 24-25. And, perhaps most peculiar, respondents' position would permit creditors to string along borrowers until the right expires simply by failing to respond to a notice of rescission or by engaging in fruitless negotiations over the rescission. *See, e.g.*, *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1326-27 (9th Cir. 2012). Congress should not be presumed to have subjected rescission to a lender's gamesmanship to the detriment of borrowers who encounter the bureaucratic silence or insincere assurances of a large bank. Properly understood, Section 1635(f) confirms the plain text of Section 1635(a)'s command that the right need only to be exercised – by notice – before the right expires after three years.

### B. The Agency's Authoritative Interpretation That Notice Exercises The Right To Rescind Warrants Deference

The Court should defer to the agency's interpretation of Section 1635 in Regulation Z and the agency's *amicus* briefs, which confirm that notifying the creditor within three years is sufficient to exercise the right to rescind. *See* Pet. Br. 35-39; U.S. Br. 31-33. "[D]eference is especially appropriate in the process of interpreting the . . . Act and Regulation Z" and so, "[u]nless demonstrably irrational," the agency's interpretation "should be dispositive." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980). Regulation Z construes Section 1635 to provide that, "[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication," 12 C.F.R. § 226.23(a)(2), and provides model forms to exercise the right, *id.* pt. 226, Apps. H-8, H-9. The agency confirmed in its *amicus* briefs before this Court that a borrower "exercises the statutory right of rescission by sending a written notice," U.S. Br. 32 (citing 12 C.F.R. §§ 226.23(a)(2), 1026.23(a)(2)), and that "[n]one of the provisions [of the statute] requires [a borrower] to file suit to exercise the right to rescind," *id.* at 17.

Respondents' arguments to reject the agency's interpretation lack merit. *First*, respondents err in contending (at 43) that Regulation Z "says nothing about what a borrower must do to obtain resolution of a contested assertion of rescission, and by when the borrower must do it."[2] Regulation Z expressly

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[2] Respondents mischaracterize the agency's letter to the Third Circuit as "conced[ing]" that "Regulation Z provides no clarity on the relevant statutory interpretation issue here." Br.

provides the method "[t]o exercise the right to rescind": "the consumer shall notify the creditor" in writing. 12 C.F.R. § 226.23(a)(2). The regulation's failure to address explicitly respondents' proposed distinction between "contested" and "uncontested" cases is of no moment. By its terms, the regulation applies to all cases. As the Solicitor General explains, "[n]othing in that regulation suggests that the procedure for exercising the rescission right is any different . . . when the creditor disputes rather than accedes to the notice." U.S. Br. 32. The government's interpretation of Regulation Z rejecting respondents' atextual distinction between "contested" and "uncontested" cases is entitled to deference. *See Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 878 (2011).

*Second*, respondents mistakenly suggest (at 44) that Regulation Z "only parrots the statute" and that the agency's *amicus* briefs "simply vouch for the . . . regulation." Regulation Z, however, undisputedly clarifies that, "[t]o exercise the right . . . , the consumer . . . notif[ies] the creditor" and further elaborates on the statutory text by requiring the notice be in writing and by specifying the concrete written means by which that notice must be given. 12 C.F.R. § 226.23(a)(2). The regulation thus "gave specificity to [the] statutory scheme" in Section 1635 and there-

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43 (citing CFPB Letter 2, *Sherzer v. Homestar Mortg. Servs.*, No. 11-4254 (3d Cir. filed Sept. 17, 2012)). The agency made no such concession. *See* CFPB Letter 2 ("Th[e] question [of] how a consumer 'exercises his right to rescind under [Section 1635(a)]" is "expressly resolved by Regulation Z"); *id.* at 2-3 ("[T]he agency's considered view [is] that neither [the Act] nor Regulation Z requires a consumer to file a lawsuit regarding his rescission within three years provided under [Section] 1635(f)").

fore warrants deference. *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006).

The agency's *amicus* briefs remove all doubt regarding the proper interpretation of Section 1635 by making clear that neither Section 1635(a) nor Regulation Z entail an unstated requirement to file a lawsuit, regardless of whether the lender "disputes" the rescission. U.S. Br. 32; *see* Pet. Br. 38-39. The agency's interpretation of its own regulation is precisely the sort of "fair and considered judgment as to what the regulation require[s]" to which this Court defers. *McCoy*, 131 S. Ct. at 881.

### C. Respondents' Interpretation Would Frustrate Congress's Purpose In Enacting Section 1635

Congress enacted Section 1635 to provide borrowers with a robust remedy to relieve them of mortgages whose terms creditors misrepresented through incomplete and inaccurate disclosures. *See* Pet. Br. 30-31. That remedy empowers borrowers by protecting them from the burdens of mortgages solicited through deception and provides a powerful deterrent that discourages creditors from committing such violations in the first place. Section 1635 thus plays a central role in effectuating Congress's purpose that the Act "promot[e] 'the informed use of credit' by assuring 'meaningful disclosure of credit terms' to consumers." *Milhollin*, 444 U.S. at 559 (quoting 15 U.S.C. § 1601 (1970)).

Respondents' interpretation would eviscerate the protections Congress provided in the rescission remedy and enfeeble the rescission right's deterrent effect. By requiring borrowers to file a lawsuit to exercise the right to rescind, rather than simply to "notify" the creditor as the text of Section 1635(a)

and Regulation Z provides, respondents would impose a substantial obstacle to borrowers' vindication of their statutory rights. Respondents recognize (at 39-40) their position imposes that burden, but they perplexingly characterize that as a virtue of their statutory interpretation. That notion, however, is inconsistent with Congress's manifest purpose in providing a simple, non-judicial remedy for borrowers in a statute that was unambiguously designed to protect them, rather than the creditors whose misleading and predatory lending practices necessitated the Act.

## II. RESPONDENTS' POLICY CONCERNS ARE UNPERSUASIVE

The text, structure, and purpose of Section 1635, confirmed by the agency's interpretation, establish that a borrower exercises the right to rescind "by notifying the creditor" and need not also file a lawsuit within three years. That should resolve the matter. *See* Pet. Br. 34; U.S. Br. 30-31; *Lewis v. City of Chicago*, 560 U.S. 205, 216-17 (2010). Respondents complain that the absence of a requirement that borrowers file suit within three years would "sow uncertainty where Congress intended repose," Br. 36, and would "proliferate unnecessary litigation," Br. 38. Even if those policy concerns could somehow justify disregarding Section 1635's plain terms, they lack merit.

### A. Section 1635 Adequately Resolves Any Commercial Uncertainty By Providing That The Right To Rescind Expires After Three Years

Section 1635(f) provides that the right to rescind "shall expire" three years after the transaction and thereby requires a borrower to exercise the right

within that time limit. Congress enacted the time limit as a targeted solution to the specific problem of "unexpired" rights of rescission that could "cloud . . . title." Pet. Br. 40-41. Section 1635(f) thus adequately resolves any "commercial uncertainty" that could result from such "clouded titles" by ensuring that the right is exercised within three years. This Court recognized in *Beach* that Section 1635(f) "completely extinguishes the right of rescission at the end of the 3-year period." 523 U.S. at 412. Accordingly, if a borrower does not notify the creditor within three years of the transaction, the right irreversibly expires – thus providing absolute commercial certainty.

Respondents unpersuasively attempt to extend Congress's reasonable concern about lingering *unexercised* rights of rescission to include rights *already exercised* through notification to the creditor if the borrower has not also filed suit to enforce the rescission. But Congress enacted Section 1635(f) to address the different uncertainty of when, if ever, a borrower would exercise a right to rescind if that right never expired. Section 1635(f) solves that problem by requiring the borrower to notify the creditor within three years. A further requirement that the borrower sue within three years is merely additive: it does no more to settle the creditor's uncertainty because the creditor already knows for certain through the borrower's notification that rescission has been exercised.

Respondents further contend (at 37) that recognizing Section 1635(f)'s time limit as a deadline for notifying the creditor pursuant to Section 1635(a), as opposed to a time bar to suit, is untenable because it "leave[s] indeterminate the time for seeking an award of [the rescission] remedy." That criticism fundamentally misunderstands Section 1635. The

statute never requires the borrower to seek an "award" of rescission from a court. Rather, pursuant to Section 1635(a), a borrower rescinds the mortgage by "notifying the creditor," thereby triggering Section 1635(b)'s procedures to unwind the transaction. If a creditor "disputes" whether the borrower's exercise of the right was valid – because, for example, the creditor contends it provided all the required disclosures – then it may promptly file suit seeking a declaratory judgment that the right was not validly exercised. *See* U.S. Br. 28. But if (as here) the creditor both fails to follow the procedures set forth in Section 1635(b) and fails to seek judicial resolution of the "dispute" it created, then (as here) the borrower may be forced to file suit to compel the creditor to follow Section 1635(b)'s procedures. Section 1635(f) need not be construed to go beyond its text to impose a time limit for the filing of such a suit; other sources of state or federal law provide such limits. *See* Pet. Br. 43-46.

### B. Respondents' Remaining Policy Concerns Are Illusory

Respondents speculate (at 38-39) that borrowers would routinely resort to dishonesty by sending "patently meritless" notices to secure rescissions because doing so "is a particularly attractive option for homeowners who are in default or facing foreclosure." Respondents thus speculate that borrowers might strategically rescind their loan agreements. Without offering any factual support, respondents then complain (*id.*) about the burdens of filing lawsuits to determine whether the rescission is valid.

To solve this invented problem, respondents would require homeowners to file a lawsuit to ensure that they are "properly confident" of their rescission

claim. Br. 40. But the Act imposes no such requirement. Congress was primarily concerned with ensuring that homeowners had ready access to the rescission remedy, not with relieving creditors of the burden of contesting in court some rescissions that may lack merit. The burden of filing suit weighs much more heavily on individual homeowners than it does on respondents, whose litigation departments have initiated hundreds of thousands of foreclosure proceedings over the last several years. *See, e.g.*, Michael B. Sauter et al., *Banks Foreclosing on the Most Homes*, 24/7 WALL ST (Mar. 12, 2013, 9:47 AM) (reporting that, in February 2013, Bank of America serviced 96,319 mortgages in foreclosure), http://247wallst.com/special-report/2013/03/12/banks-foreclosing-on-the-most-homes/3.

In any event, even if some homeowners send notices of rescission without having a valid right to rescind, this will not result in any more litigation than respondents' interpretation would require. Section 1635 creates a right to rescind that borrowers may exercise "by notifying the creditor" and establishes non-judicial procedures for unwinding the transaction. Litigation may be required only in those cases where a creditor disputes the validity of the exercise of the right. Respondents' interpretation, by contrast, would require a lawsuit for every rescission. Respondents thus paradoxically claim (at 38) that the way to limit the "proliferat[ion] [of] unnecessary litigation" is to require lawsuits. A plain language interpretation of Section 1635(a), however, would avoid such perverse logic.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

No. 13-684

# In the Supreme Court of the United States

LARRY D. JESINOSKI AND CHERYLE JESINOSKI,
PETITIONERS

*v.*

COUNTRYWIDE HOME LOANS, INC., ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS


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## QUESTION PRESENTED

The Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, gives borrowers the right to rescind certain transactions "by notifying the creditor." 15 U.S.C. 1635(a). TILA provides, however, that "[a]n obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first." 15 U.S.C. 1635(f). The question presented is as follows:

Whether the present suit is time barred because it was commenced more than three years after the relevant transaction was consummated, even though the borrowers provided the creditor written notice of their decision to rescind the transaction within the specified three-year period.

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# In the Supreme Court of the United States

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LARRY D. JESINOSKI AND CHERYLE JESINOSKI, PETITIONERS

*v.*

COUNTRYWIDE HOME LOANS, INC., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS**

## INTEREST OF THE UNITED STATES

This case concerns the right to rescind certain transactions under the Truth in Lending Act (TILA or the Act), 15 U.S.C. 1601 *et seq.* The Consumer Financial Protection Bureau (CFPB or Bureau) is authorized to "prescribe regulations to carry out the purposes" of the Act, 15 U.S.C. 1604(a), and shares authority for enforcing the Act with other federal regulators, 15 U.S.C. 1607. The United States therefore has a substantial interest in this Court's resolution of the question presented.

## STATEMENT

1. a. Congress enacted TILA in 1968 to promote the "informed use of credit." 15 U.S.C. 1601(a); see *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356,

363-366 (1973). To that end, the Act requires creditors to provide borrowers with "meaningful disclosure[s] of credit terms," 15 U.S.C. 1601(a)—such as "finance charges, annual percentage rates of interest, and the borrower's rights," *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998)—so that "the consumer will be able to compare more readily the various credit terms available to him," 15 U.S.C. 1601(a).

TILA also gives borrowers a "right to rescind" some kinds of consumer-credit transactions. 15 U.S.C. 1635(a); see 15 U.S.C. 1635(d) (right to rescind is unwaivable except in emergency circumstances). The rescission right applies to certain transactions in which a creditor takes a security interest in an obligor's "principal dwelling" and in return provides money or property that the obligor uses for non-business purposes. 15 U.S.C. 1635(a); see 15 U.S.C. 1603. The right does not apply to transactions that finance the acquisition or initial construction of a home, or to mortgage refinancing with the original creditor. See 15 U.S.C. 1635(e).

Under Section 1635(a), "the obligor shall have the right to rescind" a covered transaction "until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations * * * , of his intention to do so." 15 U.S.C. 1635(a). Creditors must "provide, in accordance with regulations * * * , appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section." *Ibid.*

Section 1635(a)'s window for exercise of the obligor's rescission right generally does not close until three business days after the later of the date the transaction is consummated or the date when a creditor provides the required forms and material disclosures. 15 U.S.C. 1635(a); see 15 U.S.C. 1635(i) (discussing rescission rights exercised after initiation of foreclosure). Even if the creditor never provides those materials, however, the federal right to rescind does not extend indefinitely. Instead, under Section 1635(f), which was added to TILA in 1974, "[a]n obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first." 15 U.S.C. 1635(f); see Act of Oct. 28, 1974, Pub. L. No. 93-495, § 405, 88 Stat. 1517.[1]

Pursuant to Section 1635(b), the obligor's exercise of the rescission right triggers a series of steps through which the transaction is unwound. See *Beach*, 523 U.S. at 412-413. First, "[w]hen an obligor exercises his right to rescind under [Section 1635(a)], he is not liable for any finance or other charge, and any security interest given by the obligor * * * becomes void upon such a rescission." 15 U.S.C. 1635(b). Second, "[w]ithin 20 days after receipt of a notice of rescission, the creditor shall return to the

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[1] Pursuant to a 1980 amendment to TILA, that time limit is extended when a government agency commences a proceeding within three years after a transaction is consummated and finds that a creditor has violated Section 1635, so long as "the obligor's right to rescind is based * * * on any matter involved in such proceeding." 15 U.S.C. 1635(f); see *ibid.* (explaining that the rescission right may expire as late as "one year following the conclusion of the proceeding, or any judicial review or period of judicial review thereof").

obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." *Ibid.* Third, "[u]pon the performance of the creditor's obligations under this section, the obligor shall tender" any property the creditor has previously delivered (or "its reasonable value"). *Ibid.*

TILA contemplates the possibility that a court will resolve a dispute between the parties after the obligor sends a notice of rescission. For example, the unwinding procedures set forth in Section 1635(b) "shall apply except when otherwise ordered by a court." 15 U.S.C. 1635(b). And a creditor who fails to comply with "any requirement under section 1635" is subject to a suit by the obligor for damages, which must be brought "within one year from the date of the occurrence of the violation." 15 U.S.C. 1640(a) and (e).

b. When TILA was enacted, Congress delegated "broad authority" to implement the statute to the Board of Governors of the Federal Reserve System (Board). *Mourning*, 411 U.S. at 365; see, *e.g.*, 15 U.S.C. 1604(a). The Board promulgated implementing regulations (known as "Regulation Z"), including regulations that specify how notice of rescission is to be provided. See *Mourning*, 411 U.S. at 368-369; 12 C.F.R. Pt. 226; 15 U.S.C. 1635(a) (borrower may rescind covered transaction "by notifying the creditor, *in accordance with regulations* * * * , of his intention to do so") (emphasis added).

In a 2010 enactment, Congress transferred to the Bureau the authority to implement and promulgate rules under TILA. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-

203, §§ 1061(b)(1), 1100A(2), 1100H, 124 Stat. 2036, 2107, 2113; *Designated Transfer Date*, 75 Fed. Reg. 57,252 (Sept. 20, 2010) (designating transfer date of July 21, 2011). On December 22, 2011, the Bureau re-promulgated Regulation Z pursuant to that transferred authority, making no relevant substantive changes to the text of the provisions that address the right of rescission. *Truth in Lending (Regulation Z)*, 76 Fed. Reg. 79,768; see 12 C.F.R. Pt. 1026.[2]

Regulation Z provides that, "[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business." 12 C.F.R. 226.23(a)(2); see 12 C.F.R. Pt. 226, Apps. H-8, H-9 (model forms for exercising rescission right); 12 C.F.R. 1026.23(a)(2). Regulation Z further provides that, if a creditor fails to deliver the required disclosures, "the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first." 12 C.F.R. 226.23(a)(3); see 12 C.F.R. 1026.23(a)(3).

2. On February 23, 2007, petitioners refinanced the mortgage on their home in Eagan, Minnesota, obtaining a loan that they used to "pa[y] off multiple consumer debts." Pet. App. 5a (internal quotation marks

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[2] Because all relevant events in this case occurred before the effective transfer date, this brief cites to the Board's regulations when discussing the parties' dispute. See pp. 5-6, *infra*.

omitted).[3] The lender failed to provide petitioners with the required number of copies of the Notice of Right to Cancel and the loan disclosures. *Ibid.*; see J.A. 29, 32-33; see also 12 C.F.R. 226.17(d), 226.23(b). The Notice of Right to Cancel that petitioners did obtain stated (under the bold heading "HOW TO CANCEL") that, "[i]f you decide to cancel this transaction, you may do so by notifying us in writing" using "any written statement that is signed and dated by you and states your intention to cancel." J.A. 29, 38-39.

On February 23, 2010, exactly three years after the transaction was consummated, petitioners sent written notice of rescission to all interested parties by certified mail. Pet. App. 5a. On March 12, 2010, respondent BAC Home Loans Servicing sent petitioners a letter stating its refusal to honor the rescission notice. *Ibid.* No other recipient responded to the notice or took any of the steps listed in Section 1635(b). J.A. 30.

3. a. On February 24, 2011, petitioners commenced this action, asserting claims under TILA and Minnesota law. Pet. App. 5a-6a. Petitioners requested that the court "declare the mortgage transaction rescinded," and they sought damages for the "failure" to honor the rescission notice. J.A. 33, 35.

Shortly after answering the complaint, respondents moved for judgment on the pleadings. See J.A. 40, 56. Citing Section 1635(f), respondents contended that petitioners could not pursue any claim premised on a right of rescission because they had filed their com-

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[3] The facts set forth here are drawn from the allegations in petitioners' amended complaint.

plaint more than three years after the refinancing took place. See Mot. for J. 1-2; J.A. 56-57.

The district court granted the motion. The court "assume[d] without deciding" that petitioners had "pled a plausible claim that they did not receive the required documents at the closing." Pet. App. 7a & n.3. The court concluded, however, that petitioners' suit was "time-barred" because the complaint was not filed within three years of February 23, 2007, the date that petitioners had "closed on the loan." *Id.* at 7a-8a. The court described Section 1635(f) as a "three-year statute of repose on claims for rescission." *Id.* at 8a-9a.

b. The court of appeals affirmed. Pet. App. 1a-3a. The court explained that "[t]he sole issue on appeal is whether mailing a notice of rescission within three years of consummating a loan is sufficient to 'exercise' the right to rescind a loan transaction pursuant to 15 U.S.C. § 1635(a) or * * * whether a party seeking to rescind the transaction is required to file a lawsuit within the three-year statutory period." *Id.* at 2a. The court concluded that it was bound by circuit precedent, see *Keiran* v. *Home Capital, Inc.*, 720 F.3d 721 (8th Cir. 2013), petition for cert. pending, No. 13-705 (filed Dec. 9, 2013), to enforce the latter approach. Pet. App. 2a. Two of the three panel members wrote separate concurrences expressing the view that *Keiran* was wrongly decided. See *id.* at 2a-3a.

c. By a vote of 6 to 4, the court of appeals denied petitioners' request for en banc review. Pet. App. 10a-11a. Judge Colloton concurred in the denial on the ground that the issue presented was ripe for resolution by this Court. *Id.* at 11a.

## SUMMARY OF ARGUMENT

A. TILA gives borrowers a federal right to rescind certain consumer-credit transactions, and the statute unambiguously describes how to exercise the right: "by notifying the creditor, in accordance with regulations." 15 U.S.C. 1635(a). The regulation that the notifying *obligor* must act "in accordance with" states that "the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication." 12 C.F.R. 226.23(a)(2). The sending of the notice triggers a series of steps through which the transaction is unwound. See 15 U.S.C. 1635(b) (giving the creditor 20 days from "receipt of a notice" to take certain acts). Section 1635(f) states that "[a]n obligor's right of rescission shall expire three years after the date of consummation of the transaction." 15 U.S.C. 1635(f). That provision places an outer limit on the period of time within which the borrower may rescind a covered transaction, but it says nothing about *how* the rescission right is exercised, and it does not establish a time limit for the filing of suit in court to enforce the legal effect of a valid notice of rescission.

Various TILA provisions contemplate that a court may become involved in a rescission-related dispute after an obligor sends a creditor a rescission notice. The court's task in such a suit is to decide whether the obligor has already rescinded the transaction by means of a notice that was timely and otherwise valid when sent—and, if so, what consequences should follow. No TILA provision, however, requires the obligor to bring suit in order to exercise his federal right to rescind.

TILA's history and purposes confirm that an obligor who sends a notice of rescission has exercised the "right of rescission" under Section 1635(f). In order to clarify

and simplify consumer-credit transactions, Congress made the means for exercising the rescission right straightforward, not costly and complex. Section 1635(f) does not suggest any intent to change that straightforward process. Rather, it simply ensures that, even in cases where the creditor fails to make the disclosures that TILA requires, the borrower must exercise his rescission right within a defined period.

B. Respondents contend that, if the obligor seeks to rescind a covered transaction more than three business days after the transaction is consummated, and the creditor contends that its disclosures were complete (and thus that the notice is untimely), the obligor must sue for rescission before the three-year period in Section 1635(f) expires. That contention lacks merit. Neither TILA nor its implementing regulations suggest any such rule. Respondents' argument conflates the TILA provisions (including Section 1635(f)) that govern the time for exercising the rescission right with the separate inquiry used to determine the timeliness of the suit.

Treating Section 1635(f) as a limit on the time for filing suit would create a number of anomalies. It would treat the three-day limit in Section 1635(a) and the three-year limit in Section 1635(f) differently, without any warrant in the statutory text. It would establish a deadline for suit that runs from a date before the borrower has a complete and present cause of action for a creditor's violation of Section 1635(b). It would create a substantial danger that, when an obligor sends a notice of rescission just before the end of the three-year period, a cause of action for a violation of Section 1635(b) would become time-barred before it accrues at all. Respondents further suggest that, even when the borrower sends a timely rescission notice, actual rescission of a covered

transaction does not occur until a court resolves in the obligor's favor any dispute over the notice's validity. But treating Section 1635(f) as establishing a three-year deadline for obtaining a favorable judicial ruling would create a particularly unreasonable scheme in which the obligor's federal rescission right would depend on the speediness of the court's decisionmaking.

Section 1635(f) is not a "statute of repose" that places an "outer limit on the right to bring a civil action." *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2182 (2014). Section 1635(f) does not limit, or even address, the right to sue. *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998). And in cases like this one, where the borrower's suit alleges that the creditor unlawfully failed to unwind a covered transaction after receiving a timely rescission notice, Section 1635(f)'s time limit does not run from "the date of the last culpable act or omission of the defendant." *CTS Corp.*, 134 S. Ct. at 2182.

Contrary to respondents' contention, recognizing that Section 1635(f) does not limit the time for filing suit will not subject creditors to open-ended TILA liability. A creditor who receives a notice of rescission sent within the Section 1635(f) period can immediately resolve any uncertainty about the status of the underlying transaction by filing suit seeking to declare the notice invalid. Uncertainty can also be resolved through a suit by the obligor. Although TILA does not impose a specific deadline by which an obligor must sue when a creditor fails to honor a notice of rescission, the Court can (in accordance with its usual practice) borrow a limitations period for such suits from an analogous source of law. In addition, a court that deems a rescission notice to have been valid when sent has flexibility in deciding whether the procedures in Section 1635(b) should apply. Thus, Congress

has struck a reasonable balance between obligors' and creditors' interests.

C. For those reasons, the plain text of the provisions at issue precludes respondents' view that Section 1635(f) specifies the time within which a suit like petitioners' must be filed. But if the Court regards those provisions as ambiguous, deference to the agency's views—which is "especially appropriate" in the TILA context, *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980)—would be warranted. The Board, and then the Bureau, adopted a regulation that represents a reasonable determination that the procedure for exercising the rescission right is the same whether or not the obligor acts in the first three days after the transaction, and whether or not the creditor accepts the validity of a rescission notice. And the Bureau has filed several amicus briefs taking that position, reflecting the agency's considered and consistent views about the proper interpretation of Regulation Z and of TILA itself.

## ARGUMENT

### A. An Obligor Exercises The Right Of Rescission By Sending A Notice And Is Not Required Under Section 1635(f) To File Suit Within The Three-Year Period Specified By That Provision

1. a. Under TILA, "[a]n obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor." 15 U.S.C. 1635(f). That provision "says nothing in terms of bringing an action" or "a suit's commencement"; rather, it speaks to the "duration" of the rescission

right. *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998). An obligor who exercises his "right of rescission" before it expires has satisfied the time limit set forth in Section 1635(f).

Section 1635(a), in turn, unambiguously describes *how* an obligor may exercise the rescission right. That subsection states that "the obligor shall have the right to rescind the transaction * * * by notifying the creditor, in accordance with regulations" of the relevant agency, "of his intention to do so." 15 U.S.C. 1635(a). Section 1635(a) also mandates that the creditor "provide * * * appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section." *Ibid.*

Section 1635(a) thus makes clear that, if a creditor fails to make the disclosures that TILA requires, an obligor who sends a notice of rescission within Section 1635(f)'s three-year period has exercised the "right of rescission" before its expiry, regardless of whether he asserts a claim in court within the same period. The obligor's responsibility in exercising the right is to "notify[]" the creditor—that is, "[t]o give notice to; to inform by words or writing, in person or by message, or by any signs which are understood; to make known." *Black's Law Dictionary* 1211 (rev. 4th ed. 1968); see also, *e.g.*, *Webster's New Twentieth Century Dictionary* 1225 (2d ed. 1969). An obligor can make his exercise of the rescission right "known" to the creditor using any writing, without invoking the authority of a court to do so. Indeed, Section 1635(a) expressly contemplates that the obligor can deliver the requisite notification by filling out a pre-printed form—hardly an indication that the filing of a full-fledged complaint is required. See 15 U.S.C. 1635(a).

Section 1635(a) also states that an obligor who wishes to "notify[] the creditor" must do so "in accordance with regulations." 15 U.S.C. 1635(a). Because TILA gives "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," the relevant portion of Regulation Z is a "legislative regulation[]" that must be "given controlling weight unless" it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843-844 (1984). Regulation Z confirms that, "[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication." 12 C.F.R. 226.23(a)(2); see 12 C.F.R. Pt. 226, Apps. H-8, H-9 (model rescission forms, provision of which limits rescission rights under 15 U.S.C. 1635(h)). And, like Section 1635, the regulation does not require the commencement of a lawsuit or refer to any means of exercising the right other than sending a written notice.

b. Other TILA provisions bolster the conclusion that sending notice is sufficient to exercise the "right of rescission" within the time specified by Section 1635(f). Section 1635(b) states that, "[w]hen an obligor exercises his right to rescind under subsection (a)," he "is not liable for any finance or other charge, and any security interest * * * becomes void upon such a rescission." 15 U.S.C. 1635(b). Accordingly, "[w]ithin 20 days after receipt of a notice of rescission, the creditor shall return to the obligor" certain money or property, "and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." *Ibid.*; see *ibid.* (stating that these "procedures * * * shall

apply except when otherwise ordered by a court"); see also 12 C.F.R. 226.23(d)(1)-(2). Section 1635(b) confirms that sending the written notice described in Section 1635(a) is not simply a preliminary step on the way to exercising the "right of rescission." Rather, provision of the notice *constitutes* the exercise of the right, with the operative legal consequences that timely rescission entails.

2. TILA adverts to the possibility that a court may become involved, at the behest of either the obligor or the creditor, after the obligor sends the rescission notice. See 15 U.S.C. 1635(b), (c) and (g); 15 U.S.C. 1640(a)(3), (c) and (g). *Inter alia*, the Act creates a cause of action for damages in 15 U.S.C. 1640, which imposes monetary liability on "any creditor who fails to comply with * * * any requirement under section 1635" and specifies where and when such an action may be brought. 15 U.S.C. 1640(a) and (e); see *Beach*, 523 U.S. at 417-418. The relevant provisions do not suggest, however, that an obligor must file suit within three years after the relevant transaction in order to prevent expiration of the rescission right under Section 1635(f).

a. In a variety of contexts, courts may be called on to determine the validity and legal effect of a borrower's notice of rescission. A creditor in receipt of a notice of rescission may seek a declaration that the notice was untimely, or that the Section 1635(b) procedures should be altered in light of the circumstances presented. See 15 U.S.C. 1635(b); 28 U.S.C. 2201; *New Me. Nat'l Bank* v. *Gendron*, 780 F. Supp. 52, 56 (D. Me. 1991). An obligor may sue for damages under Section 1640 for a creditor's failure to follow the unwinding procedures of Section 1635(b), and may seek a

declaration that the notice of rescission is valid and that the creditor is bound to comply with those procedures. See, *e.g.*, *Palmer* v. *Champion Mortg.*, 465 F.3d 24, 26-27 (1st Cir. 2006); see also 28 U.S.C. 2201. The obligor also may exercise the right of rescission through notice given to the creditor in the context of an ongoing bankruptcy or judicial foreclosure case, see, *e.g.*, 15 U.S.C. 1635(i), or may invoke a notice already sent as part of a defense raised in such an action, see, *e.g.*, *Family Fin. Servs., Inc.* v. *Spencer*, 677 A.2d 479, 482, 487 (Conn. App. Ct. 1996).

If an obligor who has sent a rescission notice is involved in a suit against a creditor that has ignored or declined to recognize the validity of the notice, the court must determine whether the notice was valid and enforceable when it was sent. If the court concludes that the notice was timely and otherwise valid, it will hold that the "right of rescission" was exercised as of the notice date, and the court can consider whether there is some special reason why the Section 1635(b) procedures should not "apply." 15 U.S.C. 1635(b); see, *e.g.*, *Sherzer* v. *Homestar Mortg. Servs.*, 707 F.3d 255, 264-265 (3d Cir. 2013) (explaining that obligor who has sent a timely notice of rescission retains "the right to the return of his property and to clear title—the rights flowing from rescission"). If the court finds that the notice was untimely or otherwise invalid, it will hold that the rescission right was never validly exercised, and that the creditor remains entitled to enforce the terms of the underlying transaction. See *id.* at 265. The court's role thus is not to rescind or decline to rescind the transaction; it is to determine whether the borrower has *already* rescind-

ed the transaction through the (extra-judicial) means specified in the statute.[4]

b. In keeping with that understanding of the court's role, TILA's rescission-related references to a

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[4] The common-law doctrine of "rescission at law," on which Congress appears to have drawn in enacting Section 1635(a) and (b) (while making some modifications to render Section 1635 more friendly to the obligor, see 15 U.S.C. 1635(b)), works in substantially the same way. See *Williams* v. *Homestake Mortg. Co.*, 968 F.2d 1137, 1139-1141 (11th Cir. 1992); Richard A. Lord, 26 *Williston on Contracts* § 68:28 (4th ed. 2003); cf. *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363 (2013) (presuming that "Congress intended to retain the substance of the common law") (internal quotation marks omitted). Pursuant to that doctrine, one party may under certain circumstances rescind a transaction by "giv[ing] notice to the [other party] that the transaction has been avoided." *Griggs* v. *E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 445-446 (4th Cir. 2004); see, *e.g.*, *Douglass* v. *Nationwide Mut. Ins. Co.*, 913 S.W.2d 277, 281-282 (Ark. 1996) (rejecting proposition that "court action is required for a rescission at law"); *Prewitt* v. *Sunnymead Orchard Co.*, 209 P. 995, 995, 998-999 (Cal. 1922); 3 Henry Campbell Black, *A Treatise on the Rescission of Contracts and Cancellation of Written Instruments* §§ 577-578 (2d ed. 1929). The non-rescinding party might dispute whether the party who gave notice in fact had a right to rescind. But if a court finds the notice to have been proper at "the time at which" it was provided, the court treats the rescission as "complete and perfect" as of that time. *Prewitt*, 209 P. at 998-999 (internal quotation marks omitted); see, *e.g.*, *Phelps* v. *U.S. Life Credit Life Ins. Co.*, 984 S.W.2d 425, 427 (Ark. 1999) (explaining that party who sent a notice had "achieved rescission by its own acts"). The court's role is merely to "confirm[] and enforc[e] that rescission" and to grant restitution if necessary. *Peterson* v. *Highland Music, Inc.*, 140 F.3d 1313, 1322-1323 (9th Cir.), cert. denied, 525 U.S. 983 (1998); see, *e.g.*, *Griggs*, 385 F.3d at 445-446; Dan B. Dobbs, *Law of Remedies* § 4.8, at 462 (2d ed. 1993) ("[T]he plaintiff effects the rescission, and the court gives a judgment for restitution if that is needed.").

judicial proceeding do not require the obligor to bring suit in order to exercise his federal right to rescind. The statute refers generally to "action[s] in which a person is determined to have a right of rescission under section 1635," 15 U.S.C. 1640(a)(3); "action[s] in which it is determined that a creditor has violated [Section 1635]," 15 U.S.C. 1635(g); and "action[s] brought under * * * section 1635," 15 U.S.C. 1640(c). All of those provisions are fully consistent with the understanding that a court's task in any suit in which the right of rescission is questioned—including a Section 1640 damages action against a creditor for failure to comply with Section 1635(b)—is to ascertain whether a prior extra-judicial notice of rescission was valid when it was sent and what consequences should follow. None of the provisions requires an obligor to file suit to exercise the right to rescind.

3. TILA's history and purposes confirm that an obligor who sends a written rescission notice has exercised the "right of rescission" under Section 1635(f) and need not file a lawsuit within the specified three-year period. See, *e.g.*, *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 219-223 (1981) (examining "the underlying purpose of the TILA").

The statute is intended "to assure a meaningful disclosure of credit terms," and to ensure that borrowers who might otherwise be confused or misled have a fair understanding of the transaction and of their rights. 15 U.S.C. 1601. Congress enacted TILA's rescission provisions in response to fraudulent home-improvement schemes in which "homeowners, particularly the poor," were "trick[ed] * * * into signing contracts at exorbitant rates, which turn[ed]

out to be liens on the family residences." 114 Cong. Rec. 14,388 (1968) (statement of Rep. Sullivan); see *id.* at 14,384 (statement of Rep. Patman); see also *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 363 (1973) (citing H.R. Rep. No. 1040, 90th Cong., 1st Sess. 13 (1967)). The right of rescission, which is broad and generally unwaivable where it applies, is a "vitally important" part of Congress's effort to combat such practices. 114 Cong. Rec. at 14,388 (statement of Rep. Sullivan); see *Barrett* v. *JP Morgan Chase Bank*, 445 F.3d 874, 881-882 (6th Cir. 2006).

In keeping with Congress's overarching purpose to make things clearer and simpler for borrowers, the exercise of the rescission right is intended to be straightforward. See 15 U.S.C. 1635(a) and (b); see also 114 Cong. Rec. at 14,390 (statement of Rep. Sullivan) (explaining that conferees rejected a proposal to require rescission notices to be sent by registered mail because they wanted to "keep[] a strong, workable provision"). Indeed, Congress has repeatedly amended TILA's rescission provisions against the backdrop of an agency regulation stating that the right of rescission can be exercised by providing notice via "mail, telegram or other means of written communication," 12 C.F.R. 226.23(a)(2). Cf., *e.g.*, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988). No provision of the statute or the regulations, and no portion of the model rescission forms that many creditors supply to obligors, suggests that the commencement of a lawsuit is a prerequisite to the valid and timely exercise of the rescission right. See 15 U.S.C. 1635(h); 12 C.F.R. Pt. 226, Apps. H-8, H-9.

To be sure, Section 1635(f), which was enacted several years after Section 1635(a) and (b), has a narrow-

er purpose than those provisions. Congress enacted Section 1635(f) to address concerns that, if a particular obligor did not receive the disclosures mandated by Section 1635(a), his right to rescind the transaction would never expire. See Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1972, as reprinted in* 119 Cong. Rec. 4595, 4597 (1973) ("[T]he titles to many residential real estate properties may become clouded by uncertainty regarding unexpired rights of rescission. The Board recommends that Congress amend [TILA] to provide a limitation on the time the right of rescission may run."); Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1971, as reprinted in* 118 Cong. Rec. 816, 818 (1972); see H.R. Conf. Rep. No. 1429, 93d Cong., 2d Sess. 37 (1974) (indicating that Section 1365(f) was part of "a series of basically technical amendments designed to improve the administration of [TILA]"); S. Rep. No. 750, 92d Cong., 2d Sess. 1 (1972).

By enacting Section 1635(f), Congress imposed an outer limit on *when* the rescission right may be exercised. Nothing in Section 1635(f) suggests, however, that Congress intended to change the existing rules regarding *how* specified transactions may be rescinded. Nor was such a change necessary to accomplish the purposes that Section 1635(f) was intended to serve. Requiring an obligor to provide notice to a creditor within three years of a transaction reduces uncertainty and places a meaningful limit on a previously unlimited right. Within a few days after the end of that three-year period, the creditor will know conclusively whether the obligor's right has been exer-

cised—and if the obligor does not send notice in time, his right will be lost forever.

### B. Respondents' Assertion That Their Initial Disclosures Were Complete Does Not Alter The Procedures By Which Petitioners Can Exercise Their Right To Rescind Or Require Petitioners To File Suit Within Three Years After The Transaction

Respondents do not dispute that, within the initial three-day period after a transaction occurs, a written notice is sufficient to exercise the obligor's right to rescind. Respondents have argued, however, that if an obligor seeks to rescind more than three business days after the transaction, and the creditor contends that its initial disclosures were complete, the obligor must sue for rescission within the three-year time limit set forth in Section 1635(f). See Resp. to Pets. 19-30. That contention lacks any grounding in the text of the relevant provisions and should be rejected.

1. a. Neither TILA nor its implementing regulations draw the distinction that respondents have posited. The relevant provisions do not suggest that an obligor acting a month after the transaction, or three years after the transaction, should exercise the right to rescind any differently than an obligor acting on the second or third day after closing. Nor do they support the unlikely proposition that the adequacy of a given rescission notice depends on an event (the creditor's subsequent acknowledgment or denial of the obligor's right to rescind) that has not yet occurred when the rescission notice is transmitted.

TILA's directive that "[a]n obligor's right of rescission shall expire" at the end of three years, 15 U.S.C. 1635(f), likewise does not support respondents' argument. What an obligor must do during the "life of the

right," *Beach*, 523 U.S. at 417, is "exercise[]" it, 15 U.S.C. 1635(b), not seek or obtain judicial confirmation that the exercise was timely and proper. When the parties dispute whether a particular notice of rescission was timely, courts may sometimes be asked (by either the creditor or the obligor) to resolve that disagreement in order to determine whether the notice should be given operative legal effect. In resolving that question, however, the court will consider (among other things) whether the notice of rescission was sent while the obligor still had the right to rescind, not whether suit was commenced before the right expired.

An examination of the separate three-day time limit set forth in Section 1635(a) confirms that understanding. In cases where a lender's initial disclosures are complete, the "right to rescind" expires at midnight of the third business day following the transaction. See 15 U.S.C. 1635(a). Respondents appear to agree that an obligor can exercise his "right to rescind" during that period by sending a written notice, and that an obligor who takes that step can validly commence suit after that three-day window if the creditor subsequently fails to unwind the transaction in accordance with TILA's requirements. See Resp. to Pets. 2-3, 19; see also 15 U.S.C. 1635(b) (setting 20-day deadline for creditor to respond to notice). Respondents thus recognize that, in cases where the creditor's initial disclosures are complete, the statutory time limit for exercising the "right to rescind" does *not* govern the filing of suit in the event that a dispute

arises as to the effectiveness of the borrower's rescission notice.[5]

There is no textual basis for treating Section 1635(f)'s three-year deadline any differently. Section 1635(a) and Section 1635(f) use essentially identical language ("right to rescind" and "right of rescission," respectively) to describe a right that must be exercised during specified time periods. Neither provision suggests that the manner in which the right must be exercised depends on which time limit is at issue. Cf. *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005). In each instance, the statute refers to the obligor's right to rescind, not to the complete unwinding of the transaction. And if a dispute arises about the validity of a particular rescission notice, or about what consequences should flow from the notice, litigation to resolve that dispute can be commenced after the specified period for exercising the rescission right has ended. See, *e.g.*, *Sherzer*, 707 F.3d at 264; *Cocroft* v. *HSBC Bank USA*, No. 10 C 3408, 2012 WL 1378645, at *2-4 (N.D. Ill. Apr. 20, 2012); *Keiran* v. *Home Capital, Inc.*, 720 F.3d 721, 731-735 (8th Cir. 2013) (Murphy, J., concurring in part and dissenting in part), petition for cert. pending, No. 13-705 (filed Dec. 9, 2013).

b. Treating Section 1635(f) as a deadline for filing suit would create additional anomalies.

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[5] Respondents are wrong in suggesting (Resp. to Pets. 24) that the validity of a rescission notice cannot become the subject of disagreement in cases where the creditor's initial disclosures are complete. Parties sometimes disagree about when the transaction was consummated, or when the notice was actually mailed or faxed. See, *e.g.*, *Stump* v. *WMC Mortg. Corp.*, No. Civ. A. 02-326, 2005 WL 645238, at *8-9 (E.D. Pa. Mar. 16, 2005).

i. This Court has "repeatedly recognized that Congress legislates against the standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." *Graham Cnty. Soil & Water Conservation Dist.* v. *United States*, 545 U.S. 409, 418 (2005) (internal quotation marks omitted). The alleged TILA violation of which petitioners principally complain is respondents' refusal, *after* receiving petitioners' notice of rescission, to unwind the transaction within 20 days by taking the steps specified in Section 1635(b). Respondents do not dispute that petitioners have a federal cause of action to challenge that refusal. Under the "standard rule" described in *Graham County*, if Congress had intended Section 1635(f) to establish a limitations period for filing suit, one would expect that period to run from the accrual of petitioners' cause of action. The three-year period specified in Section 1635(f), however, runs instead from the (much earlier) date of the underlying transaction. That fact substantially undermines respondents' contention that Section 1635(f) establishes a deadline for filing suit.

ii. Under Section 1635(b), a creditor has 20 days after receiving a "notice of rescission" to "return to the obligor any money or property" and to take other specified steps. 15 U.S.C. 1635(b). If a borrower gives written notice to the creditor just before the three-year window expires, he will not know immediately whether the creditor will in fact unwind the transaction in accordance with the statute. And until the creditor's 20-day window for unwinding the transaction expires, the borrower will ordinarily have no sound basis for alleging that the creditor has violated Section 1635(b).

Respondents' interpretation of Section 1635(f) thus creates a substantial danger that a borrower's cause of action for an alleged violation of Section 1635(b) may become time-barred before it accrues—a result this Court has particularly discountenanced. See *Graham County*, 545 U.S. at 418-419. To be sure, the borrower could avoid that result by sending the rescission notice more than 20 days before the three-year period expires, thereby preserving his ability to file suit within the three-year period if the creditor does not unwind the transaction within 20 days. A rule requiring borrowers to take that approach, however, would effectively reduce, below the three years specified in Section 1635(f), the outer limit within which a borrower may exercise his right to rescind.

iii. Respondents also suggest that, even when the borrower's notice of rescission is timely communicated to the creditor, the transaction is not *actually* rescinded until a court resolves in the borrower's favor any dispute between the parties as to the effectiveness of that notice. See Resp. to Pets. 24-25. But if a favorable judicial ruling is an essential prerequisite to the borrower's actual exercise of his right of rescission, even the borrower's filing of suit within three years of the transaction would not satisfy Section 1635(f). Rather, on that view of the statute, if a borrower's suit remains pending three years after the transaction, the borrower's right of rescission will expire and the suit must be dismissed. That would make the availability of the rescission right dependent on the speediness of the court's decisionmaking—an

unreasonable scheme that Congress is unlikely to have intended.[6]

2. Relying heavily on this Court's decision in *Beach*, respondents describe Section 1635(f) as a "statute of repose" that "fundamentally *limits* the ability to file an action." Resp. to Pets. 23 (internal quotation marks omitted); see *Keiran*, 720 F.3d at 727-729. That characterization is inapt.

a. This Court recently explained that a "statute of repose" places an "outer limit on the right to bring a civil action." *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2182 (2014). The Court also observed that the time limit established by a statute of repose "is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *Ibid.* Section 1635(f), by contrast, does not limit or otherwise address the right to sue, and its three-year time limit does not run from the defendant's "last culpable act or omission" (here, respondents' allegedly unlawful refusal to unwind the relevant transaction in accordance with Section 1635(b)). Rather, Section 1635(f) places an outer limit, measured from the date of the underlying transaction, on a borrower's exercise of his "right of rescission," thereby referring to the Section 1635(a) notification procedure that governs the "right to rescind."

It is not unusual for a statute to set a deadline for performing some action other than initiation of a lawsuit—for instance, the filing of a notice of objection, or

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[6] Reading Section 1635(f) to fix a period in which an action must be commenced could also have the counterintuitive effect of extending the three-year limit in the bankruptcy context. See *Stanley* v. *Trinchard*, 579 F.3d 515, 517-519 (5th Cir. 2009) (discussing 11 U.S.C. 108(a)).

an application for immigration relief, or an administrative request for public benefits. See, *e.g.*, *Balam-Chuc* v. *Mukasey*, 547 F.3d 1044, 1049 (9th Cir. 2008); *Iacono* v. *Office of Pers. Mgmt.*, 974 F.2d 1326, 1328 (Fed. Cir. 1992). Compliance with such a deadline may sometimes be a legal prerequisite to the subsequent vindication of a party's rights in court. The existence of such a link between the deadline and the lawsuit does not mean, however, that the filing of suit must itself be accomplished within the specified time frame.

When Congress wishes to limit the time for filing suit by means of a statute of repose, it does so expressly. The Securities Exchange Act of 1934, for example, provides that "[n]o action shall be maintained to enforce any liability created under this section, unless brought * * * within three years after such violation." 15 U.S.C. 78i(f); see *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 360 & n.6 (1991). Similarly, an ERISA provision states that "[n]o action may be commenced" more than six years from the date of a breach of fiduciary duty. 29 U.S.C. 1113; see *Radford* v. *General Dynamics Corp.*, 151 F.3d 396, 399-400 (5th Cir. 1998), cert. denied, 525 U.S. 1105 (1999). As explained above, Section 1635(f) differs markedly from those provisions, both because it does not refer to the filing of suit, and because the time limit it imposes does not run from the date of a creditor's alleged violation.

b. This Court's decision in *Beach* bolsters, rather than undermines, the conclusion that petitioners satisfied Section 1635(f)'s requirements. The borrowers in *Beach* had neither sent a notice of rescission nor filed any rescission-related suit within the three-year peri-

od after the relevant transaction was consummated. See 523 U.S. at 413, 415. They attempted, however, to assert a "right to rescind as an affirmative defense in a collection action" that was "brought by the lender" after the three-year period expired. *Id.* at 411-412. This Court held that such a defense was precluded because Section 1635(f) "completely extinguishes the right of rescission at the end of the 3-year period." *Id.* at 412. The Court explained that Section 1635(f) "says nothing in terms of bringing an action but instead provides that the 'right of rescission [under the Act] shall expire' at the end of the time period. It talks not of a suit's commencement but of a right's duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous." *Id.* at 417 (alteration in original); see *id.* at 419 ("[T]he Act permits no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run.").

In holding that the "right of rescission" has a limited "duration," the Court in *Beach* did not attempt to define the precise steps an obligor must take in order to exercise that right. Any such discussion would have been superfluous in that case, since the borrowers in *Beach* had taken *no* step to exercise their right to rescind within the first three years after the transaction. And, far from holding that Section 1635(f) establishes a time limit for filing suit, the Court emphasized the absence of any language in Section 1635(f) that speaks "in terms of bringing an action" or "a suit's commencement." 523 U.S. at 417. To the extent that *Beach* is relevant here at all, the Court's repeated contrasts between Section 1635(f) and traditional statutes of limitations, see *id.* at 416, 417-418, support

petitioners' view that the provision does not define the time for filing suit.

3. Echoing *Keiran*, see 720 F.3d at 727-729, respondents have contended (Resp. to Pets. 27-30) that, if borrowers like petitioners are not required to sue before Section 1635(f)'s three-year time limit has passed, creditors in respondents' position will face open-ended liability. Even if such "practical problems" existed, they would provide no basis for rewriting TILA's plain text. *Lewis* v. *City of Chi.*, 560 U.S. 205, 216-217 (2010); see *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 347 (1994). In any event, respondents' concerns are misplaced.

As discussed above (p. 19, *supra*), Section 1635(f)'s requirement that an obligor send a rescission notice within a three-year period provides an important measure of certainty. Once that period expires, a creditor is assured that the obligor cannot thereafter exercise the federal right of rescission by any means, including defensively in a foreclosure action. See *Beach*, 523 U.S. at 419.

If the creditor is sent a notice of rescission within the three-year period, but believes that the notice is legally ineffective (*e.g.*, because the creditor's initial disclosures were complete and the notice was sent more than three business days after the transaction), the creditor will not know immediately whether the transaction will ultimately be unwound. A creditor in that situation need not wait, however, to see whether or when the borrower will sue. Rather, the creditor can file its own suit under the Declaratory Judgment Act, requesting an order declaring the notice of rescission invalid. See *Keiran*, 720 F.3d at 734 (Murphy, J., concurring in part and dissenting in part). In such

a case, the borrower's transmittal of the rescission notice provides clear evidence of the requisite adversity. See *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 127 (2007). If the obligor sends the notice at the end of the three-year period and the creditor files suit in short order, the continuing validity of the underlying transaction can be resolved as quickly as if the obligor had filed suit immediately before the end of the Section 1635(f) period. See *Keiran*, 720 F.3d at 734 (Murphy, J., concurring in part and dissenting in part) (noting that "the obligor's initiation of a lawsuit would * * * 'unilaterally' create a cloud on the title that would not be resolved until a court order or a negotiated settlement").

The parties' dispute also could be resolved through a suit by the obligor like the one in this case, in which a court can determine retrospectively whether the notice was valid when sent. Respondents have objected that, if Section 1635(f) does not impose a time limit for the filing of such a suit, then no time limit at all applies. See Resp. to Pets. 27-28. That is not so. Where, as here, a federal statute does not specify a limitations period for a particular federal cause of action, courts "'borrow' the most suitable statute or other rule of timeliness from some other source." *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 158 (1983); see *Graham County*, 545 U.S. at 414-415.[7]

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[7] A number of possible sources for such borrowing exist here. One possibility would be to borrow the one-year limitations period that Section 1640 establishes for TILA damages actions. See *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987); see also *In re Hunter*, 400 B.R. 651, 661 (Bankr. N.D. Ill. 2009). Such a limitations period would begin to run as

If a court ultimately concludes that a borrower's notice of rescission was valid when it was sent, the court must then determine how the parties' transaction should be unwound. Contrary to respondents' argument, the passage of time need not make the unwinding process "prohibitively difficult (or impossible)." Resp. to Pets. 29; see *Keiran*, 720 F.3d at 727-729. If Congress had shared respondents' view, presumably Section 1635(f) would specify a period shorter than three years as the deadline for exercising the "right of rescission." 15 U.S.C. 1635(f). In any event, a court can consider any case-specific difficulties—and any case-specific equitable considerations, such as whether any delay is due to a creditor's unjustified refusal to recognize the notice of rescission in the first instance—in deciding whether the procedures set forth in Section 1635(b) should apply or whether the court should order "otherwise." 15 U.S.C. 1635(b).

Congress has struck a reasonable balance between creditors' and obligors' interests by giving obligors the right to rescind simply by sending notice, while requiring that right to be exercised promptly after the creditor has made the disclosures mandated by TILA, and imposing a three-year outer limit for the exercise

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soon as it became apparent that the lender would not honor the notice of rescission within 20 days of receipt. See 15 U.S.C. 1635(b); cf. *Gilbert* v. *Residential Funding LLC*, 678 F.3d 271, 278-279 (4th Cir. 2012). Another possibility would be to borrow from state-law limitations periods for actions to enforce rescission. See *Graham County*, 545 U.S. at 422. A court could also apply the doctrine of laches to bar equitable relief if the obligor's delay sufficiently prejudiced the creditor. See Saif Alaqili, *Striking a Balance: How Equitable Doctrine Restores the Purposes of TILA's Rescission Right*, 2013 U. Chi. Legal F. 711, 740-744 (2013).

of the right.[8] Congress remains free to recalibrate that balance, either by shortening Section 1635(f)'s three-year window or by expressly limiting the time within which a borrower can sue, if it concludes that TILA creates unduly prolonged uncertainty as to the validity of covered transactions. Under the statute in its current form, however, there is no sound basis for construing Section 1635(f)'s three-year deadline as a limit on the time for filing suit.

### C. Deference To The Agency's Views Is Warranted

For the reasons set forth above, the plain text of the provisions at issue in this case precludes respondents' view that Section 1635(f) specifies the time within which a suit like petitioners' must be filed. If the Court views those provisions as ambiguous, however, deference to the agency's views is warranted.

Congress entrusted first the Board, and then the Bureau, with implementing TILA, and it gave those agencies "broad" powers and responsibilities. *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 559, 566 (1980); see, *e.g.*, 15 U.S.C. 1604(a). Accordingly, the Court's "traditional acquiescence in administrative expertise is particularly apt under TILA." *Milhollin*,

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[8] Other rescission-related aspects of TILA reflect a similarly careful balancing of competing interests. TILA gives creditors various protections with respect to rescission, including "tolerances" for inaccurate disclosures, see 15 U.S.C. 1605(f), 1631, a safe harbor from liability for unintentional violations, see 15 U.S.C. 1640(c); see also 15 U.S.C. 1634, and the right to request that a court change the unwinding procedures under Section 1635(b). The statute also contains various measures that make obligors' rescission right strong and effective. See, *e.g.*, 15 U.S.C. 1635(d) (generally disapproving waiver of the right); 15 U.S.C. 1641(c) (making right applicable against creditor's assignees).

444 U.S. at 566; see *id.* at 565-568 (stating that "deference is especially appropriate in the process of interpreting [TILA] and Regulation Z," and that constructions of TILA by the Board or its staff "should be dispositive" unless "demonstrably irrational"); *Anderson Bros. Ford*, 452 U.S. at 222-223; *Mourning*, 411 U.S. at 365-366, 370.

The Board, and then the Bureau, adopted a regulation stating that an obligor exercises the statutory right of rescission by sending a written notice. See 12 C.F.R. 226.23(a)(2); 12 C.F.R. 1026.23(a)(2). Nothing in that regulation suggests that the procedure for exercising the rescission right is any different when the right is exercised at the end of the three-year period, rather than during the initial three-day period, or when the creditor disputes rather than accedes to the notice. The regulation thus represents a reasonable determination that the requirements set forth in Section 1635(a) and Section 1635(f) are uniform in all of these circumstances. See *Milhollin*, 444 U.S. at 566-567; *Mourning*, 411 U.S. at 369.

The Bureau has filed several amicus briefs taking that position, which reflect the agency's considered and consistent views about the proper interpretation of both Regulation Z and TILA. See, *e.g.*, CFPB Amicus Br., 2012 WL 1074082 (filed in *Rosenfield* v. *HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012)); cf. *Regulation Z; Truth in Lending*, 75 Fed. Reg. 58,610-58,611 (Sept. 24, 2010). Those views are entitled to deference. See *Chase Bank USA* v. *McCoy*, 131 S. Ct. 871, 878 (2011) (according *Auer* deference to agency's interpretation in an amicus brief of TILA-related regulation); see also *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 338 n.8 (2008) (explaining that an amicus

brief interpreting a statute is entitled to *Skidmore* deference).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## APPENDIX

1. 15 U.S.C. 1635* provides:

**Right of rescission as to certain transactions**

**(a) Disclosure of obligor's right to rescind**

Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Bureau, to any obligor in a transaction subject to this section the rights of the obligor under this

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* The Dodd-Frank Wall Street Reform and Consumer Protection Act replaced references to "the Board" in Section 1635 with references to "the Bureau." Those changes became effective on July 21, 2011. See Pub. L. No. 111-203, §§ 1061(b)(1), 1100A(2), 1100H, 124 Stat. 2036, 2107, 2113; *Designated Transfer Date*, 75 Fed. Reg. 57,252 (Sept. 20, 2010).

section. The creditor shall also provide, in accordance with regulations of the Bureau, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

**(b) Return of money or property following rescission**

When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

**(c) Rebuttable presumption of delivery of required disclosures**

Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

**(d) Modification and waiver of rights**

The Bureau may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

**(e) Exempted transactions; reapplication of provisions**

This section does not apply to—

(1) a residential mortgage transaction as defined in section 1602(w)[1] of this title;

(2) a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property;

(3) a transaction in which an agency of a State is the creditor; or

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[1] Section 1602(w) of this title, referred to in subsec. (e)(1), was redesignated section 1602(x) of this title by Pub. L. 111-203, title X, § 1100A(1)(A), July 21, 2010, 124 Stat. 2107.

(4) advances under a preexisting open end credit plan if a security interest has already been retained or acquired and such advances are in accordance with a previously established credit limit for such plan.

**(f) Time limit for exercise of right**

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

**(g) Additional relief**

In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.

**(h) Limitation on rescission**

An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Bureau, or a comparable written notice of the rights of the obligor, that was properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.

**(i) Rescission rights in foreclosure**

**(1) In general**

Notwithstanding section 1649 of this title, and subject to the time period provided in subsection (f) of this section, in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if—

(A) a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

(B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Bureau or a comparable written notice, and otherwise

complied with all the requirements of this section regarding notice.

**(2) Tolerance for disclosures**

Notwithstanding section 1605(f) of this title, and subject to the time period provided in subsection (f) of this section, for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $35 or is greater than the amount required to be disclosed under this subchapter.

**(3) Right of recoupment under State law**

Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.

**(4) Applicability**

This subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995.

2. 12 C.F.R. 226.23* provides:

**Right of rescission.**

(a) *Consumer's right to rescind.* (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section.[47]

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

(3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material

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* On December 22, 2011, the Bureau repromulgated this provision. See 12 C.F.R. 1026.23; *Truth in Lending (Regulation Z)*, 76 Fed. Reg. 79,768.

[47] For purposes of this section, the addition to an existing obligation of a security interest in a consumer's principal dwelling is a transaction. The right of rescission applies only to the addition of the security interest and not the existing obligation. The creditor shall deliver the notice required by paragraph (b) of this section but need not deliver new material disclosures. Delivery of the required notice shall begin the rescission period.

disclosures,[48] whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

(4) When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

(b)(1) *Notice of right to rescind.* In a transaction subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy to each if the notice is delivered in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act). The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:

(i) The retention or acquisition of a security interest in the consumer's principal dwelling.

(ii) The consumer's right to rescind the transaction.

(iii) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

---

[48] The term 'material disclosures' means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §§226.32(c) and (d) and 226.35(b)(2).

(iv) The effects of rescission, as described in paragraph (d) of this section.

(v) The date the rescission period expires.

(2) *Proper form of notice.* To satisfy the disclosure requirements of paragraph (b)(1) of this section, the creditor shall provide the appropriate model form in Appendix H of this part or a substantially similar notice.

(c) *Delay of creditor's performance.* Unless a consumer waives the right of rescission under paragraph (e) of this section, no money shall be disbursed other than in escrow, no services shall be performed and no materials delivered until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded.

(d) *Effects of rescission.* (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge.

(2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.

(3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would

be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

(4) The procedures outlined in paragraphs (d) (2) and (3) of this section may be modified by court order.

(e) *Consumer's waiver of right to rescind.* (1) The consumer may modify or waive the right to rescind if the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency. To modify or waive the right, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the right to rescind, and bears the signature of all the consumers entitled to rescind. * * *

* * * * *

(f) *Exempt transactions.* The right to rescind does not apply to the following:

(1) A residential mortgage transaction.

(2) A refinancing or consolidation by the same creditor of an extension of credit already secured by the consumer's principal dwelling. The right of rescission shall apply, however, to the extent the new amount financed exceeds the unpaid principal balance, any earned unpaid finance charge on the existing debt,

and amounts attributed solely to the costs of the refinancing or consolidation.

(3) A transaction in which a state agency is a creditor.

(4) An advance, other than an initial advance, in a series of advances or in a series of single-payment obligations that is treated as a single transaction under § 226.17(c)(6), if the notice required by paragraph (b) of this section and all material disclosures have been given to the consumer.

(5) A renewal of optional insurance premiums that is not considered a refinancing under § 226.20(a)(5).

(g) *Tolerances for accuracy*—(1) *One-half of 1 percent tolerance.* Except as provided in paragraphs (g)(2) and (h)(2) of this section, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) is understated by no more than ½ of 1 percent of the face amount of the note or $100, whichever is greater; or

(ii) is greater than the amount required to be disclosed.

(2) *One percent tolerance.* In a refinancing of a residential mortgage transaction with a new creditor (other than a transaction covered by § 226.32), if there is no new advance and no consolidation of existing loans, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered

accurate for purposes of this section if the disclosed finance charge:

(i) is understated by no more than 1 percent of the face amount of the note or $100, whichever is greater; or

(ii) is greater than the amount required to be disclosed.

(h) *Special rules for foreclosures*—(1) *Right to rescind.* After the initiation of foreclosure on the consumer's principal dwelling that secures the credit obligation, the consumer shall have the right to rescind the transaction if:

(i) A mortgage broker fee that should have been included in the finance charge was not included; or

(ii) The creditor did not provide the properly completed appropriate model form in appendix H of this part, or a substantially similar notice of rescission.

(2) *Tolerance for disclosures.* After the initiation of foreclosure on the consumer's principal dwelling that secures the credit obligation, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) is understated by no more than $35; or

(ii) is greater than the amount required to be disclosed.

# AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JUL 22 2014
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No. 13-684

In the Supreme Court of the United States

LARRY D. JESINOSKI, ET UX.,
*Petitioners*

v.

COUNTRYWIDE HOME LOANS, INC., ET AL.,
*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

# BRIEF AMICI CURIAE OF AARP, NATIONAL CONSUMER LAW CENTER, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND CENTER FOR RESPONSIBLE LENDING IN SUPPORT OF PETITIONERS

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## INTERESTS OF AMICI CURIAE[1]

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, seeks to strengthen communities, and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. AARP supports the disclosure requirements and substantive protections of the Truth in Lending Act. AARP has advocated for decades that the right to rescind a mortgage is pivotal to TILA's self-enforcing statutory scheme.

The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on the legal needs of consumers, especially low income and elderly consumers. For over 40 years the NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support.

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

NCLC is recognized nationally as a preeminent expert in consumer credit legal analysis. It is author of the widely praised eighteen-volume *Consumer Credit and Sales Legal Practice Series,* including *Truth in Lending.*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since it was founded in 1920, the ACLU has appeared before this Court in numerous cases, both as direct counsel and *amicus curiae.* The ACLU's Racial Justice Program engages in litigation and advocacy to enforce and protect the constitutional and civil rights of people who have been historically denied their rights on the basis of race, including in the area of fair lending and the racially disparate impact of the foreclosure crisis.

The National Association of Consumer Advocates ("NACA") is a nonprofit corporation whose members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. Enforcement and compliance with consumer

protection laws has been a continuing concern of NACA since its inception.

The Center for Responsible Lending ("CRL") is a nonprofit, nonpartisan organization that works to protect homeownership and family wealth by fighting predatory lending practices. Its focus is on consumer lending: primarily mortgages, payday loans, credit cards, bank overdrafts, auto loans, and student loans.

CRL's work grows directly from its affiliation with Self-Help, one of the nation's largest nonprofit community development lenders. For over 30 years, Self-Help has worked to create ownership and economic opportunity in underserved communities through responsible loans and financial services. Self-Help has provided $6 billion in financing to 75,000 homebuyers, small businesses and nonprofit organizations, and serves more than 80,000 mostly low-income families through 30 retail credit union branches in North Carolina, California, and Chicago.

## SUMMARY OF ARGUMENT

When Congress enacted the Truth in Lending Act ("TILA"), it required one simple act to exercise rescission: notice to the creditor. Over more than four decades, as it actively reshaped and revamped many of TILA's other requirements, Congress never changed or added to this simple requirement. By retaining TILA's straightforward rescission process, exercisable by a homeowner, Congress endorsed the

Federal Reserve Board's contemporaneous and longstanding interpretation that the right is exercised solely through notice.

Advancing a recently-formulated view that rescission must be exercised by filing a lawsuit, Respondents ask the Court to rewrite the plain language of the Act, which contains no such requirement. Respondents' interpretation would render meaningless Congress's express creation of civil liability for failure to respond to rescission by notice.

In adopting TILA, Congress sought to protect consumers from some of the most abusive practices in the credit marketplace. In the wake of the financial crisis that has taken such a toll on homeownership and blighted so many communities, that goal remains front and center today. Imposing an additional burden on consumers who are entitled to exercise rescission would likely lead to additional home foreclosures and the manifold collateral harms that widespread foreclosures create for communities.

## ARGUMENT

### I. TILA'S STATUTORY TEXT AND STRUCTURE, ALONG WITH ADMINISTRATIVE AND JUDICIAL INTERPRETATIONS, MAKE CLEAR THAT THE RIGHT TO RESCIND IS EXERCISED THROUGH NOTICE.

Congress created the statutory right to rescind when it enacted the Truth in Lending Act in 1968. Pub. L. No. 90-321, § 125(a), 82 Stat. (1968) (currently codified at 15 U.S.C. § 1635(a) (2012)); Appendix A, 1a. Rescission protects homeowners by giving them three days outside of the pressure cooker atmosphere of a loan closing to review the costs and benefits of the transaction before risking their most valuable asset—the home. It does this by affording them the right to cancel the transaction during that three day window. Congress created the right of rescission to redress "the numerous abuses of credit which result in rendering families homeless—often after the entire or a substantial portion of a first mortgage is paid." Kintner, Henneberger & Neill, A Primer on Truth in Lending, 13 St. Louis U.L.J. 501, 523 (1969). Other abusive credit practices emerged in the years prior to the current financial crisis; the resulting foreclosures have devastated individuals and communities. Where consumers are not provided the information Congress deemed necessary, they are deprived of the opportunity Congress intended—to use the three day period to make an informed decision and avoid abusive loans.

### A. TILA's Plain Language and Implementing Regulation Allow Rescission to Be Exercised Through Simple Notice.

The plain language of the current statute and regulation allow the consumer to exercise the right of rescission simply by giving notice to the creditor. The statute provides:

> Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest . . . is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, *the obligor shall have the right to rescind the transaction* until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, *by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so.* The creditor shall also provide, in accordance with regulations of the Bureau, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

(Emphasis added). 15 U.S.C. § 1635(a) (2012); Appendix A, 16a. The plain, unequivocal, unmistakeable meaning of this language is that a consumer who decides to exercise the right to rescind does so by notifying the creditor.

The governing regulation is equally unequivocal:

> *To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail,* telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

(Emphasis added). 12 C.F.R. § 1026.23(a)(2) (2012); Appendix B, 38a.

As discussed in detail in the next subsections, this core language has continuously remained in place from the original enactment of the statute in 1968, through several amendments and accompanying generations of administrative interpretation.

### B. The 1968 Act Created the Rescission Right and Directed Its Exercise Through Simple Notice.

When Congress enacted TILA in 1968 it provided a consumer with a simple and straightforward means to exercise the right to rescind, whether within the first three days or later if disclosures were not provided: "by notifying the creditor . . . of his intention to do so." Truth in Lending Act, Pub. L. No. 90-321, § 125(a), 82 Stat. (1968); Appendix A, 1a. Through the many amendments to and restructurings of TILA over more than four decades, the core text of § 1635(a), creating the right to rescind and the means of exercising it, has continued in the statute virtually unchanged.

As first enacted in 1968, TILA § 1635(a) read:

> (a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, *the obligor shall have the right to rescind the transaction* until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this chapter,

> whichever is later, *by notifying the creditor, in accordance with regulations of the Board, of his intention to do so.* The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section.

1968 Act, 15 U.S.C. § 1635(a) (emphasis added). The italicized language, which is at the core of this case, is unchanged since 1968 except for the 2010 replacement of "Board" with "Bureau."[2] As a commenter noted shortly after the statute's enactment, "the consumer could rescind the contract by simply giving the creditor notice of his intent to

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[2] The Federal Reserve Board ("Board") administered TILA for over 40 years until the Dodd-Frank Wall Street Reform and Consumer Protection Act transferred its authority to the Consumer Financial Protection Bureau ("Bureau") on July 21, 2011. *See* Pub. L. No. 111-203, §§ 1061(b)(1), (d), 124 Stat. 2079 (2010) (codified at 12 U.S.C. §§ 5581(b)(1), (d)); *Designated Transfer Date*, 75 Fed. Reg. 57,252, 57,252 (Sept. 20, 2010). The Bureau adopted the Board's Regulation Z implementing the rescission process without change but redesignated it from 12 C.F.R. § 226.23 to 12 C.F.R. § 1026.23 (76 Fed. Reg. 79,768 (Dec. 22, 2011)).

rescind." Note, *Truth in Lending: Judicial Modification of the Right of Rescission*, 1974 Duke L.J. 1227, 1232. And as originally enacted, if disclosures were not provided at consummation, the right to rescind continued indefinitely or until three days after the creditor provided the necessary information and notice of the right to cancel. *See, e.g.*, William E. Boyd, *Federal Consumer Credit Protection Act—A Consumer's Perspective*, 45 Notre Dame L. Rev. 171, 190 (1970). ("The effect is that for every day the creditor delays giving the rescission notice or making the other disclosures, the consumer is given another day within which to rescind the contract").

Congress took pains to emphasize the Federal Reserve Board's ("the Board") broad rulemaking authority to implement § 1635(a), three times calling upon the Board to fill out the details of the rescission process "in accordance with regulations of the Board." TILA's explicit focus on the Board's role in implementing rescission is grounded in the critical importance of the rescission right. Kintner, Henneberger & Neill, *supra*, at 527 ("Notice of the right of rescission is the most important disclosure"); *Truth in Lending Simplification and Reform Act, Hearing on S. 108 and S. 37, Before the S. Comm. on Banking, Housing, and Urban Affairs*, 96th Cong. (1979) (Remarks of Sen. Proxmire describing the right of rescission as "one of the most important protections in the act.").

### C. Contemporaneous Administrative and Judicial Interpretations of § 1635(a) Confirm That Rescission is Exercised by Providing Written Notice.

In 1969 the Board adopted Regulation Z, 12 C.F.R. Part 226, to flesh out the rescission process. Truth in Lending, 34 Fed. Reg. 2002, 2009-10 (Feb. 11, 1969); Regulation Z, 12 C.F.R. § 226.9; Appendix B, 27a – 31a.[3] It directed that the right extends for three business days following either consummation or "the date of delivery of the disclosures [of rescission rights] and all other material disclosures," whichever occurs later. *Id.* at 2010; Reg. Z, § 226.9(a); Appendix B, 27a. More importantly, it provided that rescission is exercised by providing written notice to the creditor by "mail, telegram or other writing," and specified no other requirements. *Id.*

As adopted in 1969, Regulation Z directed the creditor to furnish "two copies" of the notice to each consumer, and provided that "one . . . may be used . . . to cancel the transaction." *Id.*, Reg. Z, § 226.9(b), Appendix B, 28a. The notice itself instructed the borrower when to cancel –"within three business days from the [] date [of the transaction] or any later date on which all material disclosures required under

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[3] Through several renumberings from § 226.9 to § 226.23 to most recently § 1026.23, the rescission provision of Regulation Z has retained the same essential text and requirements. *See* Appendix B, 27a-44a.

the Truth in Lending Act have been given to you." *Id.*; Appendix B, 28a – 29a. It also stated plainly that the borrower may cancel "by notifying [name of creditor] at [address of creditor's place of business] by mail or telegram." *Id.* The regulation provided that the consumer's notice may simply say, "I hereby cancel this transaction," with a signature and a date. *Id.* Further confirming that the consumer's notice triggers the creditor's rescission obligations, the regulation provided: "Within 10 days after receipt of a notice of rescission, the creditor shall" take designated steps to acknowledge and implement the rescission. *Id.*; Reg. Z, § 226.9(d); Appendix B, 30a. The Board imposed no requirement that the consumer sue to exercise this right. *See* Appendix B, 27a – 31a.

As this Court has made clear, because it is "a contemporaneous construction of [the statute] by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new," the Board's decision not to impose an extra-statutory requirement that a lawsuit be filed to exercise rescission is entitled to "great deference." *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (internal citations and quotations omitted); *see also Milhollin v. Ford Motor Credit*, 444 U.S. 555, 566 (1980) ("[T]raditional acquiescence in administrative expertise is particularly apt under TILA, because the Federal Reserve Board has played a pivotal role in 'setting [the statutory] machinery in motion.'"). Deferring to the administrative interpretation of TILA is particularly logical at this juncture:

Regulation Z, like the statute it implements, has retained the same essential text and requirements for more than four decades directing exercise of the rescission right through simple notice whether within three days after consummation or three days after receipt of disclosures.[4]

After the promulgation of Regulation Z, federal courts of appeal interpreted the mechanics of rescission in accord with the Board, holding that even when exercised beyond the initial three day period, rescission is still exercised through notice alone. As the Fifth Circuit explained: two years after entering into a contract with a "home improvement contractor of dubious repute . . . Sosa *invoked* her statutory right of rescission . . . *by directing letters* to this effect to [her creditors]." *Sosa v. Fite*, 498 F. 2d. 114, 116, 117 (5th Cir. 1974) ("*Sosa* II") (emphasis added). Similarly, in *Littlefield v. Walt Flanagan*, "Purchasers learned of their statutory right to rescind on February 20, 1972 [15 months after consummation], and on the next day notified the creditor that they chose to exercise the right. Defendants ignored the notice." 498 F.2d 1133, 1134 (10th Cir. 1974); *id.* ("Regulation Z . . . details rules relating to notification by the seller to the purchaser of his right to rescind. Defendants ignored these

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[4] William E. Boyd, *supra*, at 191-92. ("Satisfaction of the basic requirements of the Act, as well as the giving of notice of the right to rescind, is a condition for the running of the three-day 'cooling-off' period. A creditor who fails to make these disclosures extends the period during which the consumer may rescind. . . .")

rules."); *see also Brown v. National Permanent Fed. Sav. & Loan Ass'n*, 683 F.2d 444, 447 (D.C. Cir. 1982) ("By letter dated July 18, 1980, appellee Brown exercised her statutory right to rescind"); *Palmer v. Wilson*, 502 F.2d 860, 861 (9th Cir. 1974) ("an obligor exercises his right of rescission solely by notifying the creditor within prescribed time limits of his intention to rescind.").

In each of these cases, consumers filed suit to enlist the aid of the courts to *enforce* rescission, *not* to exercise it. "Sosa has been forced to resort to federal court only because the creditors refused to recognize and abide by the plain operation of the rescission remedy, which should have been afforded self-operating effect without the need for judicial involvement." *Sosa* II, 498 F. 2d. at 122. That notice was sufficient to exercise rescission was a given. This notion undergirds the courts' analyses of the violation of § 1635(b), which occurs when creditors "ignored the notice," and the question of whether TILA provided additional redress for this second violation. *Littlefield*, 498 F.2d at 1134; *Sosa* II, 498 F. 2d at 118-19 ("[T]he statute contemplates an orderly progression of specific events . . . . Specifically, section 1635(b) envisions responsive action on the creditor's part to a rescission notice, after which the debtor then becomes obligated to tender either the property or a sum reflecting its reasonable value."); *Burley v. Bastrop*, 407 F. Supp. 773, 777 (W. D. La. 1975) (finding "defendant's obligation was clear when it received plaintiff's notice of rescission. But . . . the Loan Company 'failed to carry out any of [its]

statutory duties'") (internal citation omitted), *rev'd on other grounds*, 590 F.2d 160 (5th Cir. 1979).

### D. Congress Retained the Mechanics of Rescission Intact When It Amended TILA in 1974.

In 1974, Congress added § 1635(f), to provide that the homeowner's right of rescission terminates three years after consummation or upon sale of the home, whichever is earlier. Amendments to the Truth in Lending Act, Title IV, Pub. L. No. 93-495, § 405, 88 Stat. 1517-1518 (1974) (current version at 15 U.S.C. § 1635(f) (2012)) ("1974 Amendments") (Appendix A, 5a); *see Beach v. Ocwen Federal Bank*, 523 U.S. 410, 419 (1998). While reaffirming that TILA "vests a continuing power of rescission in the credit purchaser until three days following delivery of statutorily prescribed disclosures," Congress provided that the period for exercising the right would end three years after origination. *Sosa* II, 498 F.2d at 117-18.

In retaining the core text of § 1635(a), Congress endorsed the extant regulatory and judicial interpretations of rescission, and confirmed that the statutory right of rescission is exercised solely through written notice to the creditor. *Burley*, 407 F. Supp. at 779 ("[W]hen it amended the Truth-in-Lending Act . . . [Congress] did not choose legislatively to overrule or limit the two *Sosa* decisions regarding rescission."). Subsequently, the Board amended Regulation Z to "limit[] to a three-year period those unexpired rights which previously

continued indefinitely," but it did not otherwise alter 12 C.F.R. § 226.9, governing rescission. 40 Fed. Reg. 30085, 30086 (July 7, 1975) (adding § 226.9(h), "*Time limit for unexpired right of rescission.*"); *see* Appendix B, 32a.

### E. The Enactment of Truth in Lending Simplification Did Not Alter the Extant Rescission Process.

In 1980 Congress substantially overhauled TILA by enacting the Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, § 612, 94 Stat. 168 (1980) (current version at 15 U.S.C. § 1601 (2012)) ("TIL Simplification"); Appendix A, 7a – 10a. This Act narrowed the type of transactions subject to the right to rescind and the categories of disclosure that would trigger the right, but left untouched the core statutory provisions directing the mechanics of the rescission process. In addition, Congress made other changes that underscore that the right of rescission is exercised by giving notice.

#### 1. The TIL Simplification Act Did Not Change the Mechanics of Rescission.

In enacting TIL Simplification, Congress made no change to the plain language of § 1635(a) that directs the homeowner to exercise the right through notice, or to the creditor's obligation in § 1635(b) to

respond to that notice.[5] Since Congress focused on rescission in enacting TIL Simplification, and was well aware of the Board's interpretation of the mechanics of rescission, it is deemed to have acquiesced in that interpretation. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." (internal quotation marks omitted)). Following TIL Simplification, the Board substantially expanded Regulation Z and renumbered its rescission provision as 12 C.F.R. § 226.23. It made a slight amendment to the regulation to clarify the events from which the three

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[5] The only change was to allow creditors 20 days instead of 10 to respond to the notice. TIL Simplification, 15 U.S.C. § 1635(b); Appendix A, 8a. In testimony about this extended response time, the American Bankers Association revealed their understanding that rescission is exercised by providing notice:

> We also support the extension of the time period within which a creditor has to return any money or property to the obligor after the obligor has exercised the right to rescind. *This gives the creditors a better opportunity to determine whether or not the right to rescind is valid and has been appropriately exercised. . . .*

*Truth in Lending Simplification Reform Act, Hearing on S. 108 and S. 37, Before the S. Comm. on Banking, Housing and Urban Affairs*, 96th Cong. (1979) (Statement of David Smith, Jr., of Amer. Banker's Assn.). (emphasis added).

day rescission period runs, but retained the mechanics of the rescission process unchanged. 46 Fed. Reg. 20,892, at 122-123 (April 7, 1981); Appendix B, 33a – 37a. This core text remains unchanged today.

### 2. The 1980 Jurisdictional Amendment to § 1640(a) Demonstrates that Rescission Is Enforced, But Not Exercised, Through the Courts.

The 1980 Amendments also make plain that a lawsuit may be used to enforce rescission but is not necessary to exercise the right. Prior to the 1980 Amendments, courts were unclear about whether TILA provided a jurisdictional basis for an action to enforce rescission. *See Sosa v. Fite*, 465 F.2d 1227, 1228-29 (5th Cir. 1972) ("*Sosa* I") (finding jurisdiction under other sources of federal law, and stating that, "whether the Act itself affords the federal court the authority to grant rescission" is "[a] more difficult issue, and one we need not reach").

Congress settled the matter in 1980 by amending § 1640, which had governed jurisdiction over TILA actions since TILA's enactment, to clarify the jurisdictional basis for an action to enforce rescission. The amended provision states: "any creditor who fails to comply with any requirement . . . *including any requirement under section 125* [that is, 15 U.S.C. § 1635] . . . is liable." TIL Simplification, 15 U.S.C. § 1640(a) (emphasis added); Appendix A, 10a.

It also added that, "in the case of any successful action to enforce the foregoing liability *or in any action in which a person is determined to have a right of rescission*, [the creditor is liable for] the costs of the action, together with a reasonable attorney's fee as determined by the court." *Id.*, § 1640(a)(3); Appendix A, 9a. (emphasis added). With these amendments, Congress made "explicit that a *consumer may* institute suit under section 130 to enforce the right of rescission and recover costs and attorney's fees in a successful action." (emphasis in original). Truth in Lending Simplification Reform Act, Report of the Comm. on Banking Housing, and Urban Affairs, S. 108, 96th Cong., Sen. Report No. 96-73 at 18 (April 9, 1979) (Section by Section analysis) ("Sen. Rep. No. 96-73"); 96th Cong., 125 Cong. Rec. S396 (Jan. 23, 1979) (Remarks by Sen. Proxmire) (same). Embedded in this grant of authority to *enforce* rescission is the understanding that filing suit is not an element of *exercising* rescission. The language is permissive ("a *consumer may* institute suit"), and does not indicate that a consumer *must* file suit in order to exercise rescission.

Moreover, by authorizing such a suit under the civil liability provision, 15 U.S.C. § 1640(a), rather than under the provision governing the exercise of rescission, § 1635, Congress indicated that any civil suit concerning rescission was not directly related to the exercise of rescission. Because "section 1635 is written with the goal of making the rescission process a private one, worked out between creditor and debtor without the intervention of the courts," *Belini v. Wash. Mut. Bank, FA*, 412 F.3d 17, 25 (1st

Cir. 2005), it "does not even contemplate the necessity of judicial intervention to effect rescission. On the contrary, the section creates legal remedies which have binding legal effect absent any court action." *Sosa* II, 498 F.2d. at 121.

Respondents assert to the contrary – that a consumer must sue to exercise the right to rescind. Resp. to Pet'rs. Br. at 26, Jesinoski v. Countrywide Home Loans, Inc., 729 F.3d 1092 (8th Cir. 2013), (No. 13-684), 2014 U.S. S. Ct. Briefs LEXIS 1078, at *46. But implicit in their assertion is that § 1635 provides jurisdiction over rescission actions, an argument belied by the statute's text and structure. Section 1635 makes no reference to the jurisdiction of courts, and no reference to lawsuits except for two provisions about rights and remedies if a lawsuit is filed.[6] *See* Appendix A, 7a – 9a; *Beach*, 523 U.S. at 416 ("The subsection says nothing in terms of bringing an action"). Congress instead located jurisdiction over rescission actions in § 1640, making clear that such actions are not necessary to effectuate the right to rescission located in § 1635.

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[6] Section 1635(b) confirms that courts can continue to exercise their inherent equitable powers to modify the rescission process; it does not provide an independent source of authority for consumers to sue to enforce rescission. Section 1635(g), which was added to "explicitly provide[] that a consumer who exercises his right to rescind may also bring suit under the act for other violations not relating to rescission," is not a jurisdictional basis for a rescission action. Sen. Rep. No. 96-73 at 15 (April 9, 1979) (Section by Section analysis). Congress "codifie[d] the majority position of the courts" that consumers need not elect rescission or damages. *Id.*

By taking this route, Congress was clear that, while the time limits in § 1635(f) cut off *exercise* of the right, the statute of limitations for the filing of a consumer's action to *enforce* the right appears in § 1640. Section 1640(e) requires suit "within one year from the date of the occurrence of the violation." The "occurrence of the violation" that triggers the running of the statute of limitations for a rescission lawsuit is the creditor's violation of § 1635(b) (requiring creditor to take specific steps to effectuate rescission). If the creditor responds to the notice by returning money or property and taking steps to void its security interest, followed by the consumer tendering back, the statute's self-effectuating rescission process requires no involvement by a court. A consumer's lawsuit to enforce rescission is made necessary only by the creditor who fails to respond within 20 days after receipt of the consumer's notice by taking steps to unwind the transaction, violating § 1635(b). By amending § 1640(a) to authorize rescission actions, Congress mandated that those actions be filed within one year and twenty days after the creditor receives the rescission notice.

### 3. Because the Amended Statute Affords Damages For Failure to Respond to Notice of Rescission, Filing Suit Cannot Be Required to Exercise Rescission.

Initially, TILA's statutory penalties were available only for disclosure violations, including

failure to disclose the right to rescind, but not for the creditor's violation of § 1635(b) (failing to properly respond to rescission). 1968 Act, 15 U.S.C. § 1640(a); Appendix A, 3a ("any creditor who fails . . . to disclose . . . is liable"); *see Gerasta v. Hibernia Bank,* 575 F.2d 580, 583 (5th Cir. 1978). Congress amended § 1640(a) in 1974 to make creditors liable for failures to "comply with any requirement" of specified chapters of TILA. 1974 Amendments, § 408, 15 U.S.C. § 1640(a); Appendix A, 5a – 6a. Those chapters include the rescission provisions, and at least one court concluded that, because of the 1974 amendment, § 1640(a) remedies apply when a creditor fails to comply with § 1635. *Gerasta,* 575 F.2d at 583.

In 1980 Congress made the existence of this remedy explicit by extending § 1640(a) to a violation of "any requirement under section 125 [§ 1635]." TIL Simplification, 15 U.S.C. §1640(a); Appendix A, 10a. This new "language of the Act allows a statutory penalty to be assessed for a creditor's failure to take adequate steps to respond, within twenty days, to a debtor's rightful notice of rescission," and measures the statute of limitations from the date the creditor fails to perform in response to a borrower's notice of rescission.[7] *Belini,* 412 F.3d at 24 n.2.

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[7] "The 'date of the occurrence of the violation' cannot be the date the loan was closed; the closing is not the source of the debtor's complaint, and such a rule would create nonsensical results." *Belini,* 412 F.3d at 26.

Respondents' position before the Court fails to take account of this violation: if rescission can be exercised only upon notice *and* suit, the creditor would have no obligation to respond until the consumer files suit. At that point the court is in control of the process and the parties' obligations. Under the Respondents' analysis, there can never be a violation of § 1635(b) for failure to respond to the rescission notice, because the creditor has no obligation to respond even if it recognizes the validity of the consumer's claim.

But a consumer's valid notice of rescission alone triggers the creditor's obligation. A creditor who does not take the prescribed steps "has generally violated a 'requirement' of *section 1635* and can be held liable for damages under *section 1640.*" *Id.* at 25. (emphasis in original). A consumer exercises the right unilaterally but when a consumer sues, a court decides whether the rescission is meritorious and whether the court will enforce it. *See id.* If the court determines that the rescission is not based on a meritorious claim, a creditor will have no liability for the rescission itself, and no corresponding liability for failing to respond. If the rescission is found meritorious, a creditor can "be held liable for wrongfully refusing to rescind when asked to do so by a debtor." *Id.* at 25 n.3.

As previously explained, disclosure violations under § 1635(a) were already covered by the Act when Congress adopted the amendment to § 1640(a) in 1980 expanding liability for damages to "*any* violation" of § 1635. There is *no violation of § 1635*

that could give effect to the 1980 amendments *other than a violation of § 1635(b).* This amendment would be stripped of all meaning if there is no violation when a creditor fails to honor rescission.

### F. The 1995 Amendments Reinforced that Rescission Is Exercised Through Notice and Elevated the Exercise of Rescission Rights for Homeowners Facing Foreclosure

In 1995 Congress responded to judicial rulings that it believed imposed outsize liability on the financial services industry by amending TILA to afford creditors certain defenses from liability. In so doing, Congress reinforced that rescission is exercised through notice in two ways. First, Congress added § 1635(h), which provides an explicit defense to rescission to creditors who use the Board's model forms to provide notice of rescission rights. *See* Appendix A, 13a. In providing this defense, Congress reinforced that these forms, which explicitly direct the exercise of rescission by notice, convey all of the information mandated by § 1635(a), regarding the exercise of rescission. As long as the creditor properly completes and delivers model forms, which direct the consumer to do nothing more to exercise rescission than to sign and return the form to the creditor, it is immunized. By providing immunity when these forms are used, Congress approved the instructions in the Board's model form directing the consumer to exercise rescission simply by signing and returning the form to the creditor and imposing no further obligation to exercise the right.

Second, Congress immunized creditors from rescinding certain previously consummated loans with specified characteristics, but also created four exceptions to this immunity. Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, § 4(a), 109 Stat. 273 (1995) (current version at 15 U.S.C. §1649(a) (2012)) ("1995 Amendments"); Appendix A, 11a – 13a. Through these exceptions Congress restored liability for individual lawsuits filed and for class actions certified before certain dates. *See id.*, 12a. Significantly for this appeal, creditors also restored liability in the case of "any consumer credit transaction *with respect to which a timely notice of rescission was sent to the creditor* before June 1, 1995." 1995 Amendments, 15 USC § 1649(b)(1-4) (emphasis added); Appendix A, 12a – 13a. By separately protecting borrowers who had timely exercised rescission *through notice*, Congress again expressed the straightforward, plain reading of the statute and regulation that rescission is exercised through notice. Any other interpretation makes this exception a nullity.

The 1995 Amendments are also clear that when a homeowner is facing foreclosure, TILA provides greater rights to rescind. The 1995 Amendments generally denied access to rescission based on numerical disclosures unless disclosure of the finance charge was understated by at least "one-half of one percent of the total amount of credit extended." 1995 Amendments, 15 U.S.C.

§ 1605(f)(2).[8] However, understanding that saving homes is the primary goal of the rescission remedy, Congress revoked that rule for homeowners in foreclosure, allowing them to rescind the mortgage if the finance charge was understated by as little as $36.[9] *Id.*, 15 U.S.C. § 1635(i)(2); Appendix A, 13a – 15a. Congress further enhanced rescission in foreclosure by providing that the immunity it created in § 1649 does not apply when a homeowner is facing foreclosure. *Id.*, 15 U.S.C. § 1635(i)(1); Appendix A, 14a.

Moreover, allowing homeowners to exercise their rescission rights in foreclosure does not cloud title or render loans unenforceable. That uncertainty was addressed by this Court's decision in *Beach,* in the 1995 Amendments, and in appellate decisions interpreting rescission as a "purely individual remedy." *Andrews v. Chevy Chase Bank,* 535 F. 3d 570, 575 (7th Cir. 2008), *cert. den.* 557 U.S. 936 (2009); *McKenna v. First Horizon Home Loan Corp.,* 475 F. 3d 418 (1st Cir. 2007). But individual actions based on timely rescissions, and lawsuits filed one

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[8] The Jesinoskis' rescission claims are unaffected by the 1995 Amendments.

[9] If homeowners with a $611,000 mortgage (like the Jesinoskis) are not in foreclosure, the finance charge is deemed accurate unless it is understated by at least $3,055, or one-half of one-percent of the note.

year later, have no significant or long term impact on the functioning of the banking industry or the enforceability of mortgage contracts.

Further, if the filing of a lawsuit is mandatory, as Respondents contend, some creditors may be tempted to induce rescinding homeowners not to file a lawsuit on the false promise that the creditor will honor the rescission. If Respondents' rule prevails, and the creditor fails to deliver on its promise, the homeowner's right will nevertheless have been extinguished without consequence to the creditor, and the statute's fundamental purpose "to protect homeowners from [] unscrupulous business tactics" will be thwarted. *Gardner & North Roofing & Siding Corp. v. Board of Governors*, 464 F.2d 838, 841 (D.C. Cir. 1972).

## II. BROAD ACCESS TO TILA'S RESCISSION REMEDY PROTECTS INDIVIDUALS AND COMMUNITIES FROM THE HARMFUL EFFECTS OF FORECLOSURE.

TILA violations were widespread during the run-up to the foreclosure crisis. *See* Lea Krivinskas Shepard, *It's All About the Principal: Preserving Consumers' Right of Rescission Under the Truth in Lending Act*, 89 N.C. L. Rev. 171, 175 (2010). Allowing homeowners to exercise their TILA rescission rights through written notice minimizes foreclosures, thereby significantly mitigating harms to individuals and communities reeling from the impact of the crisis.

Congress clearly intended TILA to help homeowners avoid foreclosure. *See* Section I.F., *supra*, at 24. Given that the number of mortgage defaults skyrocketed in the wake of the mortgage crisis, the importance of foreclosure avoidance to individuals and to hard-hit communities cannot be overstated. In numerous towns and cities, foreclosures have not only harmed those families losing homes but also inflicted significant costs on neighboring homeowners, whose property values have fallen, and local governments, which face increased costs and decreased tax bases.

Across the nation, enormous numbers of homeowners have lost their homes during this crisis. As of May 2014, more than five million homes have been lost since the real estate bubble burst in September 2008. CoreLogic, Inc., *CoreLogic Reports 47,000 Completed Foreclosures in May* (July 8, 2014).[10] And the crisis continues. In Florida, more than 122,000 homes were foreclosed upon in the last year alone; in Michigan, that number was 44,000. *Id.* These foreclosures have had a substantial impact on the homeownership rate, which stands at 64.8%, down from a high of 69.2% in 2004. U.S. Census Bureau News, *Residential Vacancies and Homeownership in the First Quarter 2014*, CB14-61 U.S. Department of Commerce 5 (2014).[11] Many

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[10] http://www.corelogic.com/about-us/news/corelogic-reports-47,000-completed-foreclosures-in-may.aspx.

[11] http://www.census.gov/housing/hvs/files/currenthvspress.pdf.

more homeowners remain under water on their mortgages and thus at elevated risk of foreclosure. *See generally* Peter Dreier, Saqib Bhatti, Rob Call, Alex Schwartz & Gregory Squires, *Underwater America: How the So-Called Housing "Recovery" Is Bypassing Many American Communities*, Haas Institute 5 (2014).[12]

The financial harms stemming from all these foreclosures do not stop at the edge of the foreclosed property. Instead, even a single foreclosure has a spillover effect on neighboring properties, *see, e.g.*, Kai-yan Lee, *Foreclosure's Price-Depressing Spillover Effects on Local Properties: A Literature Review*, Federal Reserve Bank of Boston 1 (2008),[13] reducing home values, even for homeowners who are current on their mortgages or have no mortgage at all. An estimated 95 million households lost home equity between 2007 and 2012 as a result of neighbors' foreclosures. Center for Responsible Lending, *2013 Update: The Spillover Effects of Foreclosures* 1 (2013) ("*Spillover Effects 2013*").[14] A conservative estimate finds that during that time period, residents living in close proximity to properties in foreclosure (one city

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[12] http://diversity.berkeley.edu/sites/default/files/HaasInsitute_UnderwaterAmerica_PUBLISH_0.pdf.

[13] https://www.bostonfed.org/commdev/pcadp/2008/pcadp 0801.pdf.

[14] http://www.responsiblelending.org/mortgage-lending/research-analysis/2013-crl-research-update-foreclosure-spillover-effects-final-aug-19-docx.pdf.

block) lost about $2.2 trillion in property value attributable to those foreclosures. *Id.* Others have estimated the proportional loss in value within the same radius to be especially high in low to moderate-income communities. Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-family Mortgage Foreclosures on Property Values*, 17 Housing Policy Debate 57, 58, 71-72 (2006). These effects are compounded where multiple foreclosures are concentrated in one neighborhood. John P. Harding, Eric Rosenblatt & Vincent W. Yao, *The Contagion Effect of Foreclosed Properties*, 66 J. Urb. Econ. 164, 165 (2009). The impacts on homeowners of color have been especially severe—more than one-half of total spillover losses have occurred in communities of color. *Spillover Effects 2013* at 1.[15]

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[15] High-risk, predatory lending was especially common in communities of color. *See, e.g.*, Peter Dreier, Saqib Bhatti, Rob Call, Alex Schwartz & Gregory Squires, *supra*, at 5; Debbie Gruenstein Bocian, Wei Li & Keith S. Ernst, *Foreclosures by Race and Ethnicity: The Demographics of a Crisis*, Center for Responsible Lending 6 (2010), available at http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf. As a result, the foreclosure crisis has greatly exacerbated racial disparities in wealth. Between 2007 and 2010, the wealth of white families fell by 11 percent. *See* Signe-Mary McKernan, Caroline Ratcliffe, Eugene Steuerle & Sisi Zhang, *Less Than Equal: Racial Disparities in Wealth Accumulation*, The Urban Institute 3 (2013). By comparison, Hispanic families saw their wealth cut by over 40 percent, and black families saw their wealth fall by 31 percent. *Id.*at 2-3.

Foreclosures also significantly erode tax bases while simultaneously increasing local expenditures. In North Carolina, the total decline in home values and the local tax base resulting from foreclosures was estimated to be $851 million in 2005 and 2006, several years before the peak of the foreclosure crisis. Center for Responsible Lending, *Subprime Spillover: Foreclosures Cost North Carolina Neighbors $861 Million* 1 (2008).[16] A report from the U.S. Senate's Joint Economic Committee noted that a city could lose up to $20,000 per house abandoned in foreclosure in lost property taxes, unpaid utility bills, property upkeep, sewage, and maintenance. Joint Econ. Comm. of the U.S. Senate, *Sheltering Neighborhoods from the Subprime Foreclosure Storm* 15 (2007) (citing William C. Apgar and Mark Duda, *Collateral Damage: The Municipal Impact of Today's Mortgage Foreclosure Boom*, National Multi-Housing Council (2005).[17] Vacant, foreclosed properties extract additional costs, in terms of both public safety and municipal finances. Properties that have completed the foreclosure process and are held by banks, known as "Real-Estate Owned" ("REO") properties, often remain unoccupied for extended periods, depressing neighboring property values and increasing the risk of neighborhood crime and blight.

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[16] http://www.responsiblelending.org/north-carolina/nc-mortgage/tools-resources/facts-tips/nc-subprime-spillover-august-08-update.pdf.

[17] http://www.jec.senate.gov/archive/Documents/Reports/subprime11apr2007revised.pdf.

*See* Ingrid Gould Ellen, Josiah Madar & Mary Weselcouch, *The Foreclosure Crisis and Community Development: Exploring REO Dynamics in Hard-Hit Neighborhoods*, Furman Center for Real Estate & Urban Policy 2 (2013).[18] The vulnerability of vacant REO properties to vandalism and theft further decreases the value of neighboring properties. *See generally* Stephen Whitaker & Thomas J. Fitzpatrick, *The Impact of Vacant, Tax-Delinquent, and Foreclosed Property on Sales Price of Neighboring Homes*, 11-23R Federal Reserve Bank of Cleveland 1, 4-5 (March 2012).[19]

Vacant properties also reduce "eyes on the street" and provide venues for illicit activity. Ingrid Gould Ellen, Josiah Madar & Mary Weselcouch, *supra*, at 4. The violent crime rate in Charlotte, North Carolina tripled in high-foreclosure neighborhoods. G. Thomas Kingsley, Robin Smith & David Price, *The Impacts of Foreclosures on Families and Communities*, The Urban Institute 17-18 (2009) (citing Michael Bess, *Assessing the Impact of Home Foreclosures in Charlotte Neighborhoods*, 1 Geography & Public Safety 1, 2-4 (2008)).[20] In New

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[18] http://furmancenter.org/files/publications/REOHardHit WorkingPaperApril2013.pdf.

[19] http://www.clevelandfed.org/research/workpaper/2011/wp1123r.pdf.

[20] http://www.urban.org/UploadedPDF/411909_impact_of_forclosures.pdf.

York City, a single foreclosure led to a 1.3 percent increase in total crime, a 2.6 percent increase in violent crime, and a 2.6 percent increase in public order crime on that block. Furman Center for Real Estate & Public Policy, *Do Foreclosures Cause Crime?* 3 (Feb. 2013).[21] Foreclosures in these neighborhoods require municipalities to spend more on policing[22] and firefighting. A fire on a foreclosed property can cost a municipality $34,000. G. Thomas Kingsley, Robin Smith & David Price, *supra.* at 20.[23] (citing William C. Apgar and Mark Duda, *supra*, at 31). Foreclosures also increase demand for social services at times when hard-hit communities can ill afford to fund the increased need. *See* G. Thomas Kingsley, Robin Smith & David Price, *supra*, at 6. Taxpayers ultimately pay the bill for the substantially increased costs of these public services caused by the foreclosure crisis.

As with other collateral impacts of foreclosure, increases in neighborhood blight and crime due to REO properties, and their related municipal costs, have disproportionately harmed communities of

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[21] http://furmancenter.org/files/publications/DoForeclosures CauseCrime.pdf.

[22] *See* William C. Apgar & Mark Duda, *The Municipal Cost of Foreclosures: A Chicago Case Study*, Homeownership Preservation Foundation 24 (Feb. 2005), *available at* http:// www.nw.org/network/neighborworksProgs/foreclosuresolutions OLD/documents/2005Apgar-DudaStudy-FullVersion.pdf.

[23] http://www.urban.org/UploadedPDF/411909_impact_of_ forclosures.pdf.

color. A study by the National Fair Housing Alliance found substantial disparities between the maintenance of REO properties in communities of color and those in predominantly white communities. *See generally* National Fair Housing Alliance, *The Banks Are Back – Our Neighborhoods Are Not: Discrimination in the Maintenance and Marketing of REO Properties* 2 (Nov. 2011);[24] *see also* Debbie Gruenstein Bocian, Wei Li & Keith S. Ernst, *Foreclosures by Race and Ethnicity* at 3-4, available at http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf.

The broad availability of TILA rescission rights can limit the number of foreclosures, significantly mitigating collateral harms to communities, and thereby benefitting the broader economic recovery, *see* Robert C. Hockett, *It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Local Economic Recovery*, 18 Stan. J.L. Bus. & Fin. 121, 135-36 n.65 (2012). The robust protection of TILA rights is thus vitally important to the well-being of homeowners, neighborhoods, and municipalities.

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[24] http://www.nationalfairhousing.org/Portals/33/ the_banks_ are_back_web.pdf.

## CONCLUSION

Congress created the right of rescission to protect homeownership and made it easy for a homeowner to rescind through simple notice. The plain language of the statute and the contemporaneous interpretation of the Federal Reserve Board confirm that a lawsuit is not required to exercise the right. The Court should uphold this rule.

Respectfully submitted,

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# APPENDIX

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# APPENDIX A

## TRUTH IN LENDING, ORIGINAL 1968 ACT

Pub. L. No. 90-321 (1968)

(15 U.S.C. §§ 1635, 1640)

### § 125. Right of rescission as to certain transactions

(a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this chapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section.

**Original Act**

(b) When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor becomes void upon such a rescission. Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it.

(c) Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this title by a person to whom a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

**Original Act**

(d) The Board may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

(e) This section does not apply to the creation or retention of a first lien against a dwelling to finance the acquisition of that dwelling.

. . .

**§ 130. Civil liability**

(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the

**Original Act**

action together with a reasonable attorney's fee as determined by the court.

. . .

(e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

## 1974 AMENDMENTS TO THE TRUTH IN LENDING ACT

Pub. L. No. 93-495 (1974); 15 U.S.C. § 1635(f), § 1640(a)

### § 405. Time limit for right of rescission

Section 125 of the Truth in Lending Act (15 U.S.C. 1635) is amended by adding at the end thereof a new subsection as follows:

"(f) An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs earlier, notwithstanding the fact that the disclosures required under this section or any other material disclosures required under this chapter have not been delivered to the obligor."

. . .

### § 408. Civil liability

(a) Section 130 (a) of the Truth in Lending Act (15 U.S.C. 1640(a)) is amended to read as follows:

"(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter or chapter 4 of this title with respect to any person is liable to such person in an amount equal to the sum of--

"(1) any actual damage sustained by such person as a result of the failure;

**1974 Amendments**

"(2)(A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

"(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $100,000 or 1 per centum of the net worth of the creditor; and

"(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. . . ."

## TRUTH IN LENDING SIMPLIFICATION ACT

Pub. L. No. 96-221 (1980); 15 U.S.C. § 1635, § 1640(a)

SEC. 612. (a)(l) Section 125(a) of the Truth in Lending Act (15 U.S.C. 1635(a)) is amended to read as follows:

"(a) Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this title, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.".

**Truth In Lending Simplification Act**

. . .

(3) Section 125(b) of the Truth in Lending Act (15 U.S.C. 1635(b)) is amended by striking out "ten days" each place it appears therein and inserting in lieu thereof "20 days".

(4) Section 125(b) of the Truth in Lending Act (15 U.S.C. 1635(b)) is amended by adding at the end thereof the following new sentence: "The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.".

(5) Section 125(c) of the Truth in Lending Act (15 U.S.C. 1635(c)) is amended by inserting "information, forms, and" after "whom".

. . .

"(f) An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this chapter have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this title institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of section 125, and (3) the obligor's right to rescind is

based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

"(g) In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 130 for violations of this title not relating to the right to rescind.".

. . .

SEC. 615. (a) Section 130 of the Truth in Lending Act (15 U.S.C. 1640) is amended--

(1) in subsection (a)(2)(B), by striking out "in such action" and inserting in lieu thereof "under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor";

(2) in subsection (a)(3), by inserting "or in any action in which a person is determined to have a right of rescission under section 125" after "liability";

. . .

**Truth In Lending Simplification Act**

(b) Section 130(a) of the Truth in Lending Act (15 U.S.C. 1640(a)) is amended—

(1) by inserting ", including any requirement under section 125," immediately after "this chapter";

. . .

**TRUTH IN LENDING ACT AMENDMENTS OF 1995**

Pub. L. No. 104-29 (1995); 15 U.S.C. § 1649, § 1635

SEC. 4. LIMITATION ON LIABILITY.

(a) In General.--Chapter 2 of the Truth in Lending Act (*15 U.S.C. 1631* et seq.) is amended by adding at the end the following new section:

"Sec. 139. 15 U.S.C. 1649 CERTAIN LIMITATIONS ON LIABILITY.

"(a) Limitations on Liability.--For any consumer credit transaction subject to this title that is consummated before the date of the enactment of the Truth in Lending Act Amendments of 1995, a creditor or any assignee of a creditor shall have no civil, administrative, or criminal liability under this title for, and a consumer shall have no extended rescission rights under section 125(f) with respect to--

. . .

"(2) the form of written notice used by the creditor to inform the obligor of the rights of the obligor under section 125 if the creditor provided the obligor with a properly dated form of written notice published and adopted by the Board or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice; or

**1995 Amendments**

"(3) any disclosure relating to the finance charge imposed with respect to the transaction if the amount or percentage actually disclosed—

"(A) may be treated as accurate for purposes of this title if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $ 200;

"(B) may, under section 106(f)(2), be treated as accurate for purposes of section 125; or

"(C) is greater than the amount or percentage required to be disclosed under this title.

"(b) Exceptions.--Subsection (a) shall not apply to—

"(1) any individual action or counterclaim brought under this title which was filed before June 1, 1995;

"(2) any class action brought under this title for which a final order certifying a class was entered before January 1, 1995;

"(3) the named individual plaintiffs in any class action brought under this title which was filed before June 1, 1995; or

**1995 Amendments**

"(4) any consumer credit transaction with respect to which a timely notice of rescission was sent to the creditor before June 1, 1995.".

(c) Clerical Amendment.--The table of sections for chapter 2 of the Truth in Lending Act is amended by inserting after the item relating to section 138 the following new item:

"139. Certain limitations on liability.".

Sec. 5. LIMITATION ON RESCISSION LIABILITY.

Section 125 of the Truth in Lending Act (*15 U.S.C. 1635*) is further amended by adding at the end the following new subsection:

"(h) Limitation on Rescission.--An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Board, or a comparable written notice of the rights of the obligor, that was properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.".

. . .

Sec. 8. RESCISSION RIGHTS IN FORECLOSURE.

Section 125 of the Truth in Lending Act (*15 U.S.C. 1635*) is amended by inserting after

**1995 Amendments**

subsection (h) (as added by section 5 of this Act) the following new subsection:

"(i) Rescission Rights in Foreclosure.—

"(1) In general.-- Notwithstanding section 139, and subject to the time period provided in subsection (f), in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if—

"(A) a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

"(B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Board or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.

"(2) Tolerance for disclosures.-- Notwithstanding section 106(f), and subject to the time period provided in subsection (f), for the purposes of exercising any rescission rights after the

**1995 Amendments**

initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $ 35 or is greater than the amount required to be disclosed under this title.

"(3) Right of recoupment under state law.-- Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.

"(4) Applicability.-- This subsection shall apply to all consumer credit transactions in existence or consummated on or after the date of the enactment of the Truth in Lending Act Amendments of 1995.".

## CURRENT STATUTE

### 15 U.S.C. § 1635, § 1640 (2012)

### § 1635. Right of rescission as to certain transactions

### (a) Disclosure of obligor's right to rescind

Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Bureau, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Bureau, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

**Current Statute**

**(b) Return of money or property following rescission**

When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

**Current Statute**

**(c) Rebuttable presumption of delivery of required disclosures**

Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

**(d) Modification and waiver of rights**

The Bureau may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

**(e) Exempted transactions; reapplication of provisions**

. . .

**(f) Time limit for exercise of right**

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this

**Current Statute**

part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

**(g) Additional relief**

In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.

**(h) Limitation on rescission**

An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Bureau, or a

**Current Statute**

comparable written notice of the rights of the obligor, that was properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.

**(i) Rescission rights in foreclosure**

**(1) In general**

Notwithstanding section 1649 of this title, and subject to the time period provided in subsection (f) of this section, in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if-

(A) a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

(B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Bureau or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.

**Current Statute**

**(2) Tolerance for disclosures**

Notwithstanding section 1605(f) of this title, and subject to the time period provided in subsection (f) of this section, for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $35 or is greater than the amount required to be disclosed under this subchapter.

**(3) Right of recoupment under State law**

Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.

**(4) Applicability**

This subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995.

**Current Statute**

**§ 1640. Civil liability**

**(a) Individual or class action for damages; amount of award; factors determining amount of award**

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, subsection (f) or (g) of section 1641 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of-

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, . . .

or (iv) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $400 or greater than $4,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure tc comply by the same creditor shall not be more than the lesser

**Current Statute**

of $1,000,000 or 1 per centum of the net worth of the creditor;

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 or 1638(e)(7) of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court; and

(4) in the case of a failure to comply with any requirement under section 1639 of this title, paragraph (1) or (2) of section 1639b(c) of this title, or section 1639c(a) of this title, an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

. . .

**(e) Jurisdiction of courts; limitations on actions; State attorney general enforcement**

Except as provided in the subsequent sentence, any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation . . .

Any action under this section with respect to any violation of section 1639, 1639b, or 1639c of this title may be brought in any United States district court,

**Current Statute**

or in any other court of competent jurisdiction, before the end of the 3-year period beginning on the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law. An action to enforce a violation of section 1639, 1639b, 1639c, 1639d, 1639e, 1639f, 1639g, or 1639h of this title may also be brought by the appropriate State attorney general in any appropriate United States district court, or any other court of competent jurisdiction, not later than 3 years after the date on which the violation occurs. The State attorney general shall provide prior written notice of any such civil action to the Federal agency responsible for enforcement under section 1607 of this title and shall provide the agency with a copy of the complaint. If prior notice is not feasible, the State attorney general shall provide notice to such agency immediately upon instituting the action. The Federal agency may-

(1) intervene in the action;

(2) upon intervening-

(A) remove the action to the appropriate United States district court, if it was not originally brought there; and

(B) be heard on all matters arising in the action; and

(3) file a petition for appeal.

**Current Statute**

. . .

**(i) Class action moratorium'**

**(1) In general**

During the period beginning on May 18, 1995, and ending on October 1, 1995, no court may enter any order certifying any class in any action under this subchapter-

(A) which is brought in connection with any credit transaction not under an open end credit plan which is secured by a first lien on real property or a dwelling and constitutes a refinancing or consolidation of an existing extension of credit; and

(B) which is based on the alleged failure of a creditor-

(i) to include a charge actually incurred (in connection with the transaction) in the finance charge disclosed pursuant to section 1638 of this title;

(ii) to properly make any other disclosure required under section 1638 of this title as a result of the failure described in clause (i); or

(iii) to provide proper notice of rescission rights under section 1635(a) of this title due to the selection by the creditor of the incorrect form from among the model forms prescribed by the Bureau or from among forms based on such model forms.

**Current Statute**

**(2) Exceptions for certain alleged violations**

Paragraph (1) shall not apply with respect to any action-

(A) described in clause (i) or (ii) of paragraph (1)(B), if the amount disclosed as the finance charge results in an annual percentage rate that exceeds the tolerance provided in section 1606(c) of this title; or

(B) described in paragraph (1)(B)(iii), if-

(i) no notice relating to rescission rights under section 1635(a) of this title was provided in any form; or

(ii) proper notice was not provided for any reason other than the reason described in such paragraph.

# APPENDIX B

## Regulation Z, 12 C.F.R. § 226.9

34 Fed. Reg. 2009-2010 (Feb. 11, 1969)

§ 226.9. Right to rescind certain transactions.

(a) *General rule.* Except as otherwise provided in this section, in the case of any credit transaction in which a security interest is or will be retained or acquired in any real property which is used or is expected to be used as the principal residence of the customer, the customer shall have the right to rescind that transaction until midnight of the third business day,[14] following the date of consummation of that transaction or the date of delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later, by notifying the creditor by mail, telegram, or other writing of his intention to do so. Notification by mail shall be considered given at the time mailed; notification by telegram shall be considered given at the time filed for transmission; and notification by other writing shall be considered given at the time delivered to the creditor's designated place of business.

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[14] For the purposes of this section, a business day is any calendar day except Sunday, or the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans' Day, Thanksgiving, and Christmas.

**Regulation Z 1969**

(b) *Notice of opportunity to rescind.* Whenever a customer has the right to rescind a transaction under paragraph (a) of this section, the creditor shall give notice of that fact to the customer by furnishing the customer with two copies of the notice set out below, one of which may be used by the customer to cancel the transaction. Such notice shall be printed in capital and lower case letters of not less than 12-point bold-faced type on one side of a separate statement which identifies the transaction to which it relates. Such statement shall also set forth the entire paragraph (d) of this section, "Effect of rescission." If such paragraph appears on the reverse side of the statement, the face of the statement shall state: "See reverse side for important information about your right of rescission." Before furnishing copies of the notice to the customer, the creditor shall complete both copies with the name of the creditor, the address of the creditor's place of business, the date of consummation of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the customer may give notice of cancellation.

Notice to customer required by Federal Law:

You have entered into a transaction on _____ which may result in a lien,
(Date)

**Regulation Z 1969**

mortgage, or other security interest on your home. You have a legal right under Federal Law to cancel this transaction, if you desire to do so, without any penalty or obligation within three business days from the above date or any later date on which all material disclosures required under the Truth in Lending Act have been given to you. If you so cancel the transaction, any lien, mortgage, or other security interest on your home arising from this transaction is automatically void. You are also entitled to receive a refund of any downpayment or other consideration if you cancel. If you decide to cancel this transaction, you may do so by notifying:

_____

(Name of creditor)

at _____

(Address of creditor's place of business)

by mail or telegram sent not later than midnight of

_____.

(Date)

You may also use any other form of written notice identifying the transaction if it is delivered to the above address not later than that time. This notice may be used for that purpose by dating and signing below.

I hereby cancel this transaction _____

(Date)

_____

(Customer's signature)

**Regulation Z 1969**

*(c) Delay of performance.* Except as provided in paragraph (e) of this section, the creditor in any transaction subject to this section shall not perform, or cause or permit the performance of, any of the following actions until after the rescission period has expired and he has reasonably satisfied himself that the customer has not exercised his right of rescission:

(1) Disburse any money other than in escrow;
(2) Make any physical changes in the property of the customer;
(3) Perform any work or service for the customer; or
(4) Make any deliveries to the residence of the customer if the creditor has retained or will acquire a security interest other than one arising by operation of law.

*(d) Effect of rescission.* When a customer exercises his right to rescind under paragraph (a) of this section, he is not liable for any finance or other charge, and any security interest becomes void upon such a rescission. Within 10 days after receipt of a notice of rescission, the creditor shall return to the customer any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the customer, the customer may retain possession of it. Upon the performance of the creditor's obligations under this section, the

customer shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the customer shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the customer, at the option of the customer. If the creditor does not take possession of the property within 10 days after the tender by the customer, ownership of the property vests in the customer without obligation on his part to pay for it.

**Regulation Z, § 226.9(h) (1975)**

40 Fed. Reg. 30086 (July 17, 1975)

§ 226.9. Right to rescind certain transactions.

. . .

(h) *Time limit for unexpired right of rescission.* In the event the creditor fails to deliver to the customer the disclosures required by this section or the other material disclosures required by this Part, a customer's right to rescind a transaction pursuant to this section shall expire the earlier of (1) three years after the date of consummation of the transaction, or (2) the date the customer transfers all his interest, both equitable and legal, in the property.

**Regulation Z, § 226.23 (1981)**

46 Fed. Reg. 20848 121-123 (April 7, 1981)

§ 226.23. Right of rescission.

(a) *Consumer's right to rescind.* (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section. n47

n 47 For purposes of this section, the addition to an existing obligation of a security interest in a consumer's principal dwelling is a transaction. The right of rescission applies only to the addition of the security interest and not the existing obligation. The creditor shall deliver the notice required by paragraph (b) of this section but need not deliver new material disclosures. Delivery of the required notice shall begin the rescission period.

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

**Regulation Z, § 226.23 (1981)**

(3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, n48 whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with § 125(f) of the act.

n 48 The term "material disclosures" means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule.

(4) When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

(b) *Notice of right to rescind.* In a transaction subject to rescission, a creditor shall deliver 2 copies of the notice of the right to rescind to each consumer entitled to rescind. The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:

(1) The retention or acquisition of a security interest in the consumer's principal dwelling.

**Regulation Z, § 226.23 (1981)**

(2) The consumer's right to rescind the transaction.

(3) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(4) The effects of rescission, as described in paragraph (d) of this section.

(5) The date the rescission period expires.

(c) *Delay of creditor's performance.* Unless a consumer waives the right of rescission under paragraph (e) of this section, no money shall be disbursed other than in escrow, no services shall be performed and no materials delivered until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded.

(d) *Effects of rescission.* (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge.

(2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action

**Regulation Z, § 226.23 (1981)**

necessary to reflect the termination of the security interest.

(3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

(4) The procedures outlined in paragraphs (d) (2) and (3) of this section may be modified by court order.

(e) *Consumer's waiver of right to rescind.* The consumer may modify or waive the right to rescind if the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency. To modify or waive the right, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the right to rescind, and bears the signature of all of the consumers entitled to rescind. Printed forms for this purpose are prohibited.

**Regulation Z, § 226.23 (1981)**

(f) *Exempt transactions.* The right to rescind does not apply to the following: . . .

## 12 C.F.R. §1026.23 – CURRENT REGULATION Z

§1026.23 Right of rescission.

(a) Consumer's right to rescind. (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section. For purposes of this section, the addition to an existing obligation of a security interest in a consumer's principal dwelling is a transaction. The right of rescission applies only to the addition of the security interest and not the existing obligation. The creditor shall deliver the notice required by paragraph (b) of this section but need not deliver new material disclosures. Delivery of the required notice shall begin the rescission period.

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

(3)(i) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice

**Current Regulation Z**

required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

(ii) For purposes of this paragraph (a)(3), the term "material disclosures" means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §§ 1026.32(c) and (d) and 1026.43(g).

(4) When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

(b)(1) Notice of right to rescind. In a transaction subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy to each if the notice is delivered in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act). The notice shall be on a separate document that identifies the transaction

**Current Regulation Z**

and shall clearly and conspicuously disclose the following:

(i) The retention or acquisition of a security interest in the consumer's principal dwelling.

(ii) The consumer's right to rescind the transaction.

(iii) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(iv) The effects of rescission, as described in paragraph (d) of this section.

(v) The date the rescission period expires.

(2) Proper form of notice. To satisfy the disclosure requirements of paragraph (b)(1) of this section, the creditor shall provide the appropriate model form in Appendix H of this part or a substantially similar notice.

(c) Delay of creditor's performance. Unless a consumer waives the right of rescission under paragraph (e) of this section, no money shall be disbursed other than in escrow, no services shall be performed and no materials delivered until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded.

**Current Regulation Z**

(d) Effects of rescission. (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge.

(2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.

(3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

(4) The procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order.

**Current Regulation Z**

(e) Consumer's waiver of right to rescind. The consumer may modify or waive the right to rescind if the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency. To modify or waive the right, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the right to rescind, and bears the signature of all the consumers entitled to rescind. Printed forms for this purpose are prohibited.

(f) Exempt transactions. The right to rescind does not apply to the following:

. . .

(g) Tolerances for accuracy. (1) One-half of 1 percent tolerance. Except as provided in paragraphs (g)(2) and (h)(2) of this section, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) Is understated by no more than 1/2 of 1 percent of the face amount of the note or $ 100, whichever is greater; or

(ii) Is greater than the amount required to be disclosed.

**Current Regulation Z**

(2) One percent tolerance. In a refinancing of a residential mortgage transaction with a new creditor (other than a transaction covered by § 1026.32), if there is no new advance and no consolidation of existing loans, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) Is understated by no more than 1 percent of the face amount of the note or $ 100, whichever is greater; or

(ii) Is greater than the amount required to be disclosed.

(h) Special rules for foreclosures. (1) Right to rescind. After the initiation of foreclosure on the consumer's principal dwelling that secures the credit obligation, the consumer shall have the right to rescind the transaction if:

(i) A mortgage broker fee that should have been included in the finance charge was not included; or

(ii) The creditor did not provide the properly completed appropriate model form in Appendix H of this part, or a substantially similar notice of rescission.

(2) Tolerance for disclosures. After the initiation of foreclosure on the consumer's principal dwelling

**Current Regulation Z**

that secures the credit obligation, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) Is understated by no more than $ 35; or

(ii) Is greater than the amount required to be disclosed.

# AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 17 2014
OFFICE OF THE CLERK

No. 13-684

IN THE
# Supreme Court of the United States

LARRY D. JESINOSKI AND CHERYLE JESINOSKI,
*Petitioners,*
v.
COUNTRYWIDE HOME LOANS, INC.,
SUBSIDIARY OF BANK OF AMERICA N.A.,
D/B/A/ AMERICA'S WHOLESALE LENDER, ET AL.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF FOR THE AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CONSUMER MORTGAGE COALITION, INDEPENDENT COMMUNITY BANKERS OF AMERICA, AND MORTGAGE BANKERS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Does a borrower exercise his right to rescind a transaction in satisfaction of the requirements of Section 1635 of the Truth in Lending Act ("TILA") by "notifying the creditor" in writing within three years of the consummation of the transaction, as the Third, Fourth, and Eleventh Circuits have held, or must a borrower file a lawsuit within three years of the consummation of the transaction, as the First, Sixth, Eighth, Ninth, and Tenth Circuits have held?

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## BRIEF OF THE FINANCIAL SERVICES *AMICI* IN SUPPORT OF RESPONDENTS

### INTEREST OF THE *AMICI* [1]

This brief is filed by the American Bankers Association, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, Independent Community Bankers of America and Mortgage Bankers Association (collectively the "Financial Services *Amici*" or "*amici*").

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small.

The American Financial Services Association ("AFSA") is the national trade association for the consumer credit industry protecting access to credit and consumer choice. AFSA's members include, among others, banks, mortgage lenders, credit card companies and diversified financial services firms. AFSA has provided services to its members for over ninety years.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than amici or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

Member institutions of the Consumer Bankers Association ("CBA") are the leaders in consumer financial services, including mortgage and home equity lending, nationwide. They include most of the nation's largest bank holding companies, as well as regional and super community banks that collectively hold two-thirds of the industry's total assets. The CBA frequently appears as an *amicus curiae* or a party in litigation where the issues in dispute are of widespread importance or concern to the banking industry.

The Consumer Mortgage Coalition ("CMC") is a trade association of national mortgage lenders, mortgage servicers, and service providers, committed to nationwide rationalization of consumer mortgage laws and regulations. The CMC regularly appears as *amicus curiae* in litigation with implications for the national mortgage lending marketplace.

The Independent Community Bankers of America® ("ICBA"), the nation's voice for more than 6,500 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. ICBA members operate 24,000 locations nationwide, employ 300,000 Americans and hold $1.3 trillion in assets, $1 trillion in deposits and $800 billion in loans to consumers, small businesses and the agricultural community. For more information, visit www.icba.org.

The Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the

association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mba.org.

The Financial Services *Amici* frequently appear in litigation where the issues raised are of widespread importance and concern to their members. That is the case here, because the Eighth Circuit's holding that rescission under TILA requires a borrower to file a lawsuit within three years of consummation of the loan is an appropriate reading of the statute that properly balances a borrower's right to receive disclosures, a creditor's right to repayment, and the market's need for certainty. A contrary holding—that a borrower must merely submit notice of an intent to rescind to a creditor to preserve indefinitely the right to seek rescission—would force creditors to sue borrowers rather than work with them, and would cloud title to properties. In the end, this would harm not only *amici* and their members, but also borrowers.

## SUMMARY OF ARGUMENT

TILA gives certain borrowers a right to rescind their mortgage loans. Although that right typically lasts for three days from the time the loan is made, 15 U.S.C. § 1635(a), it can extend to three years if the creditor fails to make certain disclosures required by TILA, 15 U.S.C. § 1635(f). But Congress was unequivocal in saying that, once those three years pass, the rescission right "shall expire." *Id.* This Court has found these terms "so straightforward as to render any limitation on the time for seeking a remedy superfluous." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998).

Despite Congress's "manifest intent" to put rescission under TILA to rest after three years, *id.* at 419, Petitioners and the Consumer Financial Protection Bureau ("CFPB") (as *amicus curiae*) now propose a new way to evade Congress's three-year bar. They believe the period becomes irrelevant whenever a borrower sends a notice of intent to rescind to the creditor within three years.

The First, Sixth, Eighth, Ninth, and Tenth Circuits have held that Section 1635(f) requires borrowers to file a lawsuit within the three years of consummation of the transaction to invoke TILA's rescission provision, while the Third, Fourth, and Eleventh Circuits have held that Section 1635(f) requires only that a borrower notify a creditor in writing within three years of consummation that he intends to rescind.

Petitioners' approach would fundamentally undermine the finality and clarity Congress intended this statute to provide. It would upset the careful balance of remedies Congress struck in TILA. It would do so for the sake of a remedy that borrowers may invoke—and in the experience of *amici* and their members,

almost invariably invoke—not because there was any mistake or misunderstanding of a loan's terms at inception, but instead when the borrower is in default, has no genuine basis to rescind, and has no ability to tender the loan proceeds as required. It also would allow a borrower to strip a creditor of its security interest instantaneously and unilaterally—even if the creditor complied fully with TILA. But most importantly, Petitioners' approach would cast a shadow of uncertainty over the housing finance market, resulting in additional costs for the very borrowers that TILA was meant to benefit. *Amici* thus agree with Respondents that the Court of Appeals' decision should be affirmed.

## ARGUMENT

### I. SECTION 1635(F) IS A STATUTE OF REPOSE THAT EXTINGUISHES THE RIGHT TO RESCIND AFTER THREE YEARS, BARRING ANY SUIT PREMISED ON THAT RIGHT.

Section 1635(f) "governs the life of the underlying right [to rescind]," not just the time for bringing a suit to award that remedy. *Beach*, 523 U.S. at 417. Because it limits the underlying right directly, Section 1635(f) is a statute of repose. *E.g.*, *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 301 n.18 (3d Cir. 2010). Courts have never assumed the role of awarding a remedy on the basis of a right that has already been extinguished. A cause of action consists of "the unlawful violation of a right which the facts show." *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 13 (1951) (citation omitted).

A plaintiff must have a valid cause of action (and a present entitlement to effectuate it) to bring a suit. *E.g.*, *McMahon v. United States*, 186 F.2d 227, 230 (3d

Cir. 1950). But by virtue of Section 1635(f), a plaintiff suing after the critical three-year mark lacks the right necessary to support the suit—whether the borrower sought to privately assert that remedy before bringing suit or not. *See McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1329 (9th Cir. 2012).

Respondents' brief addresses the statutory interpretation of Section 1635 in greater detail, and thus *amici* focus here on the practical—and negative—ramifications of Petitioners' argument. Furthermore, these practical effects support Respondents' interpretation that Section 1635(f) requires borrowers to file suit within three years of consummation of a loan if the lender disputes the borrower's notice of intention to rescind.

## II. PETITIONERS' INTERPRETATION OF SECTION 1635(F) WOULD CAUSE SUBSTANTIAL HARM TO CREDITORS, BORROWERS, AND COURTS.

### A. After Three Days, a Borrower's Right of Rescission Is Not Unconditional, and Therefore Cannot Be Automatic.

Petitioners argue that, after three days, rescission under Section 1635 is automatic—that is, rescission is complete immediately upon notice from a borrower. Were this true, a borrower could instantly—and unilaterally—void a creditor's note and security instrument, 15 U.S.C. § 1635(b), even if the notice were not valid, and the burden would fall upon the creditor to file suit to disprove the borrower's claimed right of rescission. *See, e.g.*, *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1172 (9th Cir. 2003). This result makes sense within the three-day "cooling-off period," where Section 1635's right of rescission is un-

conditional (i.e. all notices are indeed valid in 3-day period), funds have not been disbursed, and the security interest has not been recorded.

But such a result is neither sensible nor equitable after those first three days. After three days, the right to rescind is conditional rather than automatic—borrowers may only rescind a loan if they did not receive the specified disclosures. 15 U.S.C. § 1635(a). Further, at this point, funds have been disbursed and the security interest has been recorded. "Clearly it was not the intent of Congress to reduce the mortgage company to an unsecured creditor or to simply permit the debtor to indefinitely extend the loan without interest." *Am. Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 820-21 (4th Cir. 2007). Such a result "makes no sense when, as here, the lender contests the ground upon which the borrower rescinds." *Yamamoto*, 329 F.3d at 1172.

This is not to suggest that Congress left borrowers without *any* remedy after three years. To the contrary, Section 1640(a) specifically contemplates a damage award for a violation of the TILA rescission provision. *See* 15 U.S.C. § 1640(a) (permitting damages for a failure to comply with "any requirement under Section 1635" as well as attorney's fees). Consequently, if a borrower could establish that a creditor wrongfully refused to rescind, the borrower could still receive both actual and statutory damages, as well as attorney's fees, making it possible even for borrowers in dire straits to seek these remedies. But that relief, unlike the rescission right, would not present a potential cloud over a property's title for years to come. (And actual damages presumably would be unavailable to a borrower who has not, or cannot, tender back the loan proceeds.) Congress

anticipated that borrowers would receive a measure of relief, but not by warping the rescission right into a perpetual cause of action that imposes significant expense on the creditor and the marketplace.

### B. Petitioners' Interpretation, Under Which Notice of Intent to Rescind Automatically Rescinds the Transaction, Would Increase Unnecessary Litigation

Petitioners' approach would force courts to grapple with largely groundless rescission suits for many years to come. Indeed, the enormous body of recent rescission-related case law cited by the parties and the CFPB reflects the substantial growth in rescission litigation in the wake of the financial crisis. Petitioners' interpretation would increase, rather than stem, the flow of unnecessary rescission litigation, overwhelming the courts.

Furthermore, in the experience of *amici* and their members, TILA rescission claims frequently lack merit. Borrowers often raise such claims on the eve of bankruptcy or in the midst of a foreclosure proceeding as a last ditch effort to avoid enforcement of their obligations. These borrowers rarely have the ability to "return the loan principal" as TILA requires. *Marr v. Bank of Am.*, 662 F.3d 963, 966 (7th Cir. 2011) ("[T]his requirement often has the practical effect of ruling out rescission[.]").[2] And having reviewed countless loan files for rescission claims, *amici's* members rarely

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[2] "[A]n underwater TILA plaintiff typically cannot refinance her mortgage, and the sale of her home usually cannot generate sufficient proceeds to fully finance the borrower's tender obligation." Lee Krivinskas Shepard, *It's All About the Principal: Preserving Consumers' Right of Rescission Under the Truth in Lending Act*, 89 N.C. L. Rev. 171, 181 (2010).

encounter loans where the borrower did not receive the required disclosures and is entitled to rescission, further illustrating that often there is no TILA violation at all.

Under Petitioners' approach, creditors would need to file lawsuits even where borrowers clearly did not have meritorious claims for rescission in order to prove that no such claim existed. While courts can identify such meritless claims, they cannot do so preemptively and before the parties and the court incur the costs of litigation. Conversely, the requirement that borrowers initiate litigation where there is a dispute regarding their entitlement to rescind highlights the costs of making futile rescission claims to potential plaintiffs, requiring them to consider whether it is worth investing time and money in groundless claims.

## III. REQUIRING BORROWERS TO FILE A LAWSUIT WITHIN THREE YEARS PROVIDES CERTAINTY TO THE MARKETPLACE WHILE PRESERVING BORROWERS' RESCISSION RIGHTS.

### A. If a Notice Alone Rescinds the Security Instrument, it Can Impair Foreclosure Actions and Cloud Title to Property for Years.

Petitioners' interpretation of Section 1635 would increase uncertainty and risk in the marketplace. If a borrower can bring a rescission action at any time if the borrower files notice within three years, this will create a perverse incentive for borrowers to "pre-file"—or claim that they have pre-filed—a notice of rescission during the three year period. The borrower could then hold that right of rescission indefinitely until the borrower finds it useful to challenge the

creditor's security interest (e.g., as a defense to a creditor's foreclosure action).

Indeed, even the logistics of affecting a rescission by notice creates uncertainty; unlike a lawsuit, a borrower's notice might be lost or misdirected and a creditor may never know of the borrower's purported rescission. So long as the borrowers are willing to allege that they have mailed a rescission notice within three years from closing, borrowers would enjoy a potentially indefinite right to rescind. A creditor or subsequent holder may never be confident that its security interest is clear and may always face the prospect of being reduced to unsecured status.

If Section 1635 only requires notice to rescind a mortgage loan, not even a completed foreclosure would necessarily guarantee that the creditor had eliminated a borrower's interest in the property. If the creditor subsequently sold the property securing the loan through foreclosure and the borrower did not raise rescission as a defense,[3] under Petitioners' view, the creditor would have effectively enforced an extinguished security interest, an action that could have further legal consequences under various unfair trade practices theories.

Not only does Petitioners' view of Section 1635's rescission right create a perpetual hurdle to a creditor's ability to foreclose on a delinquent borrower, but it would likely "cloud a bank's title on foreclosure." *Beach*, 523 U.S. at 418. Because any rescission notice by borrowers would not be recorded, a purchaser could

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[3] This could occur either because the property was located in a state which permits foreclosures to occur without judicial supervision or because the borrower simply failed to defend a judicial foreclosure action.

not run a title search to confirm that buying a previously-foreclosed home would provide clear title to the property. Such uncertainty has real consequences for the lending market. Buyers will only be willing to purchase homes coming out of foreclosure if they can be confident that they are taking clear title. Likewise, the secondary mortgage market can only deliver a steady supply of reasonably-priced loans if securitizers and investors can be certain that loans are valid and enforceable.[4]

Adopting Petitioners' approach would increase the costs to creditors and their assignees on every loan in other ways. To obtain marketable title to the property, creditors would have to file a quiet title action against the borrower as part of every foreclosure. And litigation would increase not just between creditors and borrowers, but also between (a) creditors themselves; (b) secondary market participants and creditors; and (c) home buyers and home sellers. Ultimately, these costs would be borne by borrowers. TILA rescission also serves an "insurance function for consumers" that "increase[s] the seller's marginal costs," which will "tend to raise the price" for the loan. Michael Aikens, *Off-Contract Harms: The Real Effect of Liberal Rescission Rights on Contract Price*, 121 Yale L.J. Online 69, 79 (2011). Petitioners' approach would expand both the reach and the potential payout of this "insurance," further increasing costs.

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[4] "Commentators have estimated that the existence of an efficiently operating secondary mortgage market may reduce the cost of home mortgage credit by up to two percent." Franklin D. Cordell, *The Private Mortgage Insurer's Action for Rescission for Misrepresentation: Limiting a Potential Threat to Private Sector Participation in the Secondary Mortgage Market*, 47 Wash. & Lee L. Rev. 587, 593 (1990) (footnote omitted).

In support of Petitioners, the States argue that *amici's* "cloud-on-title concerns" are unfounded because some states allow for longer rescission periods and these states have not suffered "systemic clouding-of-title problems." Br. for the States as *Amici Curiae* in Supp, of Pet'rs at 16-17, *Jesinoski v. Countrywide Home Loans, Inc.*, No. 13-684 (U.S. filed July 22, 2014). However, the States misunderstand *amici's* concerns. The cloud on title is not created by the long rescission period—a title search would reveal a long rescission period and buyers could account for this in making an offer on the property. Rather, the potential cloud on title would result from Petitioners' claim that a borrower can rescind a mortgage loan merely by sending a private note to the creditor. If this were the law (and it is not), a third-party purchaser would never know of the rescission and thus could never be sure that he possesses clear title.

### B. As a Public Record Tied to the Land, a Lawsuit is Searchable by Buyers and Insurers, Providing Necessary Certainty to the Market.

While a private notice of rescission is not recorded, a lawsuit creates a public record that reduces subsequent litigation and gives all parties a fair opportunity to understand who has an ownership interest in the land. Importantly, a party to a lawsuit involving land can file a *lis pendens* in the local land records to provide notice of a superior legal interest and alert potential purchasers or creditors of the dispute.[5] Under the Eighth Circuit's holding, a creditor could either agree to rescind the loan (and file

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[5] Even if a *lis pendens* were not filed, the existence of the lawsuit would be a public record searchable by interested parties.

the appropriate documents in the local land records) or the borrower could file suit to establish rescission (and file a *lis pendens* in the land records); either way, there would be a public record that potential buyers and title insurance companies could review to determine the ownership status of the property. Were the Court to adopt Petitioners' position, however, buyers and insurers would be required to prove a negative—to show that the borrower did not send an unrecorded rescission notice to the creditor.

## IV. PETITIONERS' INTERPRETATION THAT NOTICE ALONE IS SUFFICIENT TO EFFECT RESCISSION ACTUALLY PUTS BORROWERS IN A WORSE POSITION

### A. Forcing Creditors to Litigate Rescission Claims Will Harm Borrowers Seeking to Rescind Their Loans.

Petitioners rightly state that a borrower is entitled to rescission after three days only if the creditor did not timely provide the borrower with the required disclosures under Section 1635. Based on the experience of *amici* and their members, it is the rare exception that a borrower does not timely receive the required disclosures. These documents are part of the closing documentation for all loans, and nearly all borrowers' loan files plainly indicate that the borrower did in fact receive the required disclosures. Finally, borrowers rarely litigate their rescission claims; were these meritorious allegations, borrowers would raise their claims in court.

The large number of meritless rescission notices is driven by borrowers who have defaulted on their loans and are attempting to stave off foreclosure. Were the

Court to adopt Petitioners' interpretation of Section 1635, this would leave creditors with only two options upon receipt of a notice of rescission: (i) begin the rescission process for those few borrowers actually eligible for rescission, or (ii) file a lawsuit in the overwhelming majority of cases to prove that the borrower did receive the required disclosures, or is otherwise ineligible for rescission, and that the note and the security instrument remain valid. Since Petitioners' interpretation of the law would not require the borrower to identify the defect that the borrower believes enables an extended right to rescission but merely to send in their rescission notice, even determining which of these two paths to follow will cost hundreds, if not thousands, of dollars since the creditor must analyze the loan file to attempt to identify any required disclosure the borrower may not have received.

If a creditor has to file suit to refute a borrower's meritless claim of rescission on the eve of default or foreclosure, this only serves to weaken the borrower's already tenuous financial position. According to the terms of most security instruments, borrowers are responsible for any legal costs incurred by creditors to enforce or protect their security interests. *See, e.g.*, *Fannie Mae/Freddie Mac Uniform Security Instruments*, Minn. Form 3024 ¶ 9, *available at* https://www.fanniemae.com/content/legal_form/3024w.doc (if "(b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding . . . to enforce laws or regulations) . . . then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument . . . [and a]ny amounts

disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument.").[6] If a borrower could not pay these costs, these costs would either reduce the borrower's equity or be added to a potential deficiency balance (and additional cost by the creditor) if the property were sold through foreclosure.

Furthermore, Petitioners' interpretation will unnecessarily lengthen the foreclosure process, which also harms borrowers. The time between a borrower defaulting on their home mortgage loan and the completion of a foreclosure action is at an all-time high, with foreclosure timelines in several states already exceeding a year. *See, e.g.*, *Fannie Mae Foreclosure Time Frames and Compensatory Fee Allowable Delays* (Sept. 18, 2013), *available at* https://www.fanniemae.com/content/guide_exhibit/foreclosure-timeframes-compensatory-fees-allowable-delays.pdf (providing for more than a year between a borrower's last paid installment and a foreclosure sale date in thirty states); *Freddie Mac Single Family State Foreclosure Time Line*, *available at* http://www.freddiemac.com/singlefamily/news/pdf/New_State_Foreclosure_Time_Lines.pdf (providing for more than a year between the due date of a borrower's last paid installment and a foreclosure sale date in twenty-five states). If borrowers could force creditors to file suit to prove that a borrower's rescission claim is meritless, this will lead to further frivolous litigation in courts that will further slow foreclosure actions. Longer foreclosure actions prolong the period of adverse credit

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[6] Counsel for *amici* notes that they have never seen a security instrument that did not hold the borrower responsible for repaying the creditor's costs to enforce or protect its security interest.

reporting, increase the deficiency balance that the borrower must repay, and further delay the borrower's efforts to move forward. *See, e.g.*, Larry Cordell, *et al*, *The Cost of Delay, Working Paper No. 13-15* at 3 (Apr. 24, 2013), *available at* http://www.philadelphiafed.org/bank-resources/publications/presentations/the-cost-of-delay.pdf (concluding that longer foreclosure timelines greatly increase the costs associated with foreclosure); Kristopher Gerardi, Lauren Lambie-Hanson & Paul S. Willen, *Do Borrower Rights Improve Borrower Outcomes? Evidence from the Foreclosure Process, No. 11-9* (Dec. 7, 2011), *available at* http://www.bostonfed.org/economic/ppdp/2011/ppdp1109.pdf (finding that legal protections, such as judicial supervision of foreclosures, do not have any effect on the number of borrowers who cure delinquencies and avoid foreclosure).

### B. Rather than Helping Distressed Borrowers, Rescission Diverts Borrowers Who Could Be Helped Through Modification and Other Assistance Programs.

Borrowers in distress have options for working with their creditors to avoid foreclosure. Borrowers can apply for relief through federal programs, such as the Home Affordable Modification Program ("HAMP") and Home Affordable Refinance Program ("HARP"). Most creditors also offer proprietary modification programs and forbearance options. Sometimes a clean break from an unsustainable mortgage is a better alternative for a borrower; in such situations creditors can provide their own short sale or deed-in-lieu arrangements or guide borrowers to the federal Home Affordable Foreclosure Alternatives ("HAFA") program—thereby allowing these borrowers to exit an

unaffordable loan with dignity and with substantially less damage to their credit scores.

Currently, creditors can work with borrowers who improperly notify a creditor that they are eligible for rescission. However, Petitioners' interpretation of Section 1635 would impair creditors' ability to work with borrowers in distress. Under Petitioners' position, once a borrower submitted a notice of rescission, rescission would have to be treated as if it would occur automatically, and the creditor would be forced to file a lawsuit to preserve its interest in the property. Once the parties were adverse in litigation, the creditor would be impeded in its ability to pursue loss mitigation options with the borrower. *See, e.g.*, *Making Home Affordable® Program: Handbook for Servicers of Non-GSE Mortgages* at 176 (Ver. 4.4 Mar. 3, 2014), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_44.pdf (noting that a short sale deal can be terminated if "[l]itigation is initiated or threatened that could affect title to the property"). Further, if the Court found that the borrower timely received the correct notices and was not entitled to rescind, the borrower would owe even more under the loan and be less likely to qualify for these alternatives to default and foreclosure.

### C. All Borrowers Will Bear the Cost of the Litigation Caused by Making Rescission Automatic Upon Receipt of Notice.

Perhaps the greatest costs associated with Petitioners' interpretation of Section 1635, however, fall upon those who are least responsible for this situation—those who are able to make their payments on-time.

As discussed above, most rescission claims are filed by borrowers who are in default or are on the cusp of bankruptcy or foreclosure. Although borrowers are obligated to pay creditors' costs to defend against rescission claims, many—if not most—distressed borrowers will be unable to pay their own mortgages, let alone these additional legal fees. These unrecouped costs ultimately will be passed on to borrowers who pay their mortgage loans on time in the form of higher borrowing costs.

Further, the drawn-out foreclosure process has well-documented, negative effects on homeowners generally. A lengthy foreclosure process discourages the borrower from maintaining the home, which leads to neighborhood blight and depresses nearby property values, causing the surrounding homeowners to lose equity. *See, e.g.*, Stephan Whitaker and Thomas J. Fitzpatrick IV, *The Impact of Vacant, Tax-Delinquent, and Foreclosed Property on Sales Prices of Neighboring Homes* at 3 (Mar. 2012), *available at* http://www.clevelandfed.org/research/workpaper/2011/wp1123r.pdf ("During foreclosure, homeowners have little incentive to maintain their homes, as every dollar put into upkeep or improvements will primarily benefit the foreclosing lender."); Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs, Freddie Mac Working Paper 08-01* at 1 (Mar. 2008) *available at* http://www.freddiemac.com/news/pdf/interventions_in_mortgage_default.pdf (finding that the costs associated with foreclosures "rise significantly with the length of the foreclosure timeline"); Jenny Schuetz, Vicki Been & Ingrid Gould Ellen, *Neighborhood Effects of Concentrated Mortgage Foreclosures, New York University Law and Economics Working Papers* at 15 (Sept. 18, 2008),

*available at* http:// lsr.nellco.org/cgi/viewcontent. cgi? article=1155&context=nyu_lewp (noting that "the magnitude and duration of spillover effects [from foreclosures] depends on the extent and timing of visible signs of deterioration, when and to whom the property is sold, when and by whom it is occupied, etc.");. This reduction in equity can make it more difficult for surrounding homeowners to avoid foreclosure through refinancing, loan modifications, or other means.

Finally, lower property values also lead to a drop in property taxes to provide services to communities. The housing market is just now beginning to recover from financial-crisis lows; by lengthening the foreclosure process as described above, Petitioners' approach would lengthen this recovery as well at the expense of all homeowners.

## CONCLUSION

For the reasons stated above and in Respondents' brief, the Circuit Court's decision should be affirmed.

Respectfully submitted,

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September 17, 2014

# AMICUS CURIAE BRIEF

No. 13-684

IN THE

# Supreme Court of the United States

LARRY D. JESINOSKI AND CHERYLE JESINOSKI,

*Petitioners,*

v.

COUNTRYWIDE HOME LOANS, INC., ET AL.,

*Respondents.*

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

## BRIEF OF PROFESSOR RICHARD R.W. BROOKS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICUS CURIAE[1]

Richard R.W. Brooks is the Charles Keller Beekman Professor of Law at Columbia Law School. He was previously the Leighton Homer Surbeck Professor at the Yale Law School. Prior to joining the law faculty at Yale in 2003, Professor Brooks taught at Northwestern University and Cornell University. He holds a J.D. from the University of Chicago Law School, a Ph.D. and M.A. from the University of California at Berkeley (both in economics; dissertation title: Essays on the Role of Law and Regulation in Contracts and Organizations), and a B.A. from Cornell University.

Professor Brooks has written extensively on contract law, including several editions of the casebooks and edited volumes *Contracts: Cases and Materials* (Farnsworth) (co-author) (Foundation Press, most recent ed. 2013) and *Selections For Contracts* (co-author) (Foundation Press, most recent ed. 2013). He has written numerous articles on remedies: *On and Off Contract Remedies Inducing Cooperative Investments*, 14 Am. Law & Econ. Rev. 488 (2012); *Beyond Ex Post Expediency: An Ex Ante View of Rescission and Restitution*, 68 Wash. & Lee L. Rev. 1171 (2011); and *Remedies On and Off Contract*, 120 Yale L.J. 690 (2011) (co-author) (addressing when rescission may be elected and the appropriate remedies following rescission). His other works include *Fram-*

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[1] The parties' consents to the filing of amicus briefs are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or his counsel made such a contribution.

*ing Contracts: Why Loss Framing Increases Effort*, 168 J. Institutional & Theoretical Econ. 62 (2012); *Covenants Without Courts: Enforcing Residential Segregation with Legally Unenforceable Agreements*, 101 Am. Econ. Rev. Papers & Proc. 360 (2011); *The Efficient Performance Hypothesis*, 116 Yale L.J. 568 (2006); and *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 Stan. L. Rev. 381 (2005) (co-author). His most recent book, *Saving The Neighborhood: Racially Restrictive Covenants, Law, and Social Norms* (co-author) (Harvard University Press, 2013), focuses on the enforcement of restrictive property agreements through the mid-twentieth century at law and in equity.

Congress's use of the remedy of rescission in the Truth in Lending Act (TILA) raises important questions about the interplay between common law rescission and statutory rescission. Professor Brooks has a strong interest in the consistent understanding and application of historical common law doctrines related to contracts. He submits this brief with the hope that it may aid the Court in its disposition of this case.

## SUMMARY OF ARGUMENT

Petitioners and the government invoke principles of common law rescission as support for their construction of rescission under TILA. *Amicus curiae* seeks to clarify the American doctrinal approach to rescission at common law, which is to some extent incompletely described by petitioners and the government.

Common law traditionally allowed a party having proper grounds two distinct forms of a rescission

remedy: rescission at law and rescission in equity. In neither form was notice alone generally sufficient to rescind a contract. Rescission in equity required an action to be commenced, resulting in an express decree by the court to accomplish rescission. Rescission at law required prompt notice to the counterparty along with, importantly, tender or offer of tender, as rescission always contemplates restoration to the *status quo ante*. Yet the practical impossibility of restitution achieving the *status quo ante*—a counterfactual state approximated at best, perhaps, by restoration *in specie* of benefits received—left courts with considerable discretion to tacitly grant or deny rescission in actions at law. And that, in substance, is what courts did at common law. Theoretical recitations of the at-law doctrine, suggesting that rescission was unilaterally completed at the moment of notice and tender, are belied by this prevalent, virtually inevitable pattern of its application in practice.

*Amicus* expresses no position as to whether TILA provides for notice alone as a sufficient condition to rescind a loan contract under the statute. The parties appear to agree that Congress varied rescission under TILA from common law conventions. However, to the extent the correct understanding of the common law informs the Court's construction of TILA, a regime under which notice alone is sufficient to accomplish rescission—as petitioners and the government seek—would constitute a significant departure from established common law doctrine.

## ARGUMENT

At common law, if one party wanted to rescind a contract and the other party did not agree or acquiesce, the rescinding party had to bring an action in

court—either at law or in equity. Although the legal and equitable actions to rescind had different features, both involved substantial judicial discretion and exercise of the court's authority, going well beyond mere recognition and enforcement of a rescission declared by one party.

Petitioners and the government argue that under TILA, notice alone is sufficient to rescind a contract, and they contend that the common law supports this statutory position by arguing that this approach is consistent with the common law. *See* Pet. Br. 12-13, 31-32; U.S. Br. 16 n.4. *Contra* Resp. Br. 7-9, 17-18, 28-31. *Amicus* takes no position on the correct statutory interpretation. Rather, this brief is confined to the question whether *the common law* provided for rescission by notice alone.

As a historical matter, petitioners and the government are incorrect to suggest that rescission at law was effective upon notice alone. This brief clarifies this point and the others stated above.

### A. Power to Rescind

Rescission is a power to end legal relations created by valid or voidable contracts.[2] The power may be directed mutually among parties to the contract, allowing them to reach an "agreement of rescission,"[3] or singly by a party through "unilateral rescission."

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[2] *See, e.g.*, Restatement (First) of Contracts § 480 (1932) (referring to "[t]he power of any party . . . to avoid a transaction"); *see also* Casenote, *Release—Fraud—Rescission—Tender*, 29 Yale L.J. 688, 688 (1920) (observing "[a] party has the power to avoid by rescission a release obtained from him by fraud").

[3] *See* Restatement (Second) of Contracts § 283 (1981).

### *1. Agreement of Rescission*

When rescission occurs by *ex post* agreement—*i.e.*, when the parties to an already-formed contract agree to rescind it—that rescission is necessarily mutual rather than unilateral. Rescission by agreement does not entail one party's invoking a provision of the original contract giving it a right to rescind or cancel; rather, it reflects the creation of a new contract, legal enforcement of which requires the mutual assent and consent of the parties. Agreements to rescind *may* require restoration of benefits. Parties seeking to enforce an agreement to rescind would proceed along lines of ordinary contract enforcement.

### *2. Unilateral Rescission*

Absent agreement or acquiescence of the counterparty, a party may still proceed unilaterally if it has an individual power of rescission. Either of two general conditions can give rise to this individual power to rescind. First, breach by the counterparty may give a party an election to affirm the agreement and pursue contract remedies or to disaffirm the agreement by rescinding the contract and pursue remedies in restitution.[4] Second, a voidable agreement (as opposed to a breached contract) may allow for unilateral rescission if proper grounds exist. Unilateral rescission *always* contemplates complete and mutual restoration of benefits, even when recognizing its

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[4] *See generally* Richard R.W. Brooks & Alexander Stremitzer, *Remedies On and Off Contract*, 120 Yale L.J. 690 (2011). It has been suggested that breach by counterparty may be taken as an offer to rescind, giving a party the power to accept and thereby by convert the breach into an "agreement to rescind." *Id.* 695 n.10. Little turns on this interpretive nuance for purposes of the matter before the court.

impracticability or impossibility in practice.[5] Parties seeking to unilaterally rescind a contract traditionally had two routes at common law—the so-called actions of rescission "at law" and "in equity."

### B. Rescission at Law and Rescission in Equity

At common law, rescission at law was distinct from rescission in equity both procedurally and substantively. Rescission at law, according to formulaic statements of doctrine, demanded that a party first satisfy certain strict requirements prior to commencing the action "at law." As an initial matter, the claimant had to identify proper grounds to rescind at law (such as fraud or duress), and give the counterparty clear and unambiguous notice of rescission, and tender or offer to tender benefits received from the counterparty in order to restore him to the *status quo ante*.[6]

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[5] Restatement (Third) of Restitution and Unjust Enrichment § 54 cmt. h (2011) ("Rescission includes an implicit mutual accounting in which each party makes restitution of any values received in the transaction being set aside that are not capable of specific restitution."); *see also id.* cmt. b.

[6] "[N]otice of rescission is not effectual for any purpose unless given at a time when the party has a clear right to rescind, or under circumstances justifying him in that course." 2 Henry C. Black, *A Treatise on the Rescission of Contracts and Cancellation of Written Instruments* § 569, 1342 (1916) [hereinafter "Black"]. Plaintiff does not have to give grounds for rescission (*id.* § 573, at 1348-49), but the notice itself must be unambiguous and unequivocal (*id.* § 574, at 1350; 1 Dan B. Dobbs, *Law of Remedies: Damages—Equity—Restitution* § 4.8, at 674 (2d ed. 1993)). When the right is unclear or contested, the party asserting the condition giving the right of rescission has the burden to establish the existence of the condition.

Equity, as Chief Judge Cardozo observed, was "not crippled at such times by an inexorable formula."[7] In equity, the absence of strictly legal grounds for rescission was not fatal,[8] nor was failure to give notice of rescission,[9] or tender or offer of tender to the counterparty.[10] Rescission in equity allowed courts to apply broad equitable principles in deciding whether to decree a contract rescinded. Courts of equity exercised considerable latitude in deciding whether the substantive grounds urged for rescinding a contract were sufficiently weighty to allow rescission. Equitable actions for rescission entailed more lenient grounds and for this reason were seen as discretionary and not subject to the strictures of actions for rescission at law. The different formulations used for law and equity suggested sharp dis-

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[7] *Marr v. Tumulty*, 256 N.Y. 15, 21 (1931).

[8] *See, e.g., Stewart v. Preston Pipeline Inc.*, 36 Cal. Rptr. 3d 901, 920 (Ct. App. 2005) (rescission based on unconscionability); Cal. Civ. Code § 1689(b)(6) (enacting equitable sensibility that allowed rescission "[i]f the public interest will be prejudiced by permitting the contract to stand").

[9] *Langdon v. Loup River Pub. Power Dist.*, 297 N.W. 557, 559 (Neb. 1941) (in equity, "[t]he giving of a notice of rescission was not necessary"). Often suit was sufficient for notice. "When a party seeks to rescind a contract by his own act, he must give the other party notice; but when he seeks the aid of a court for that purpose, *the bringing of the action is sufficient* disaffirmance for the purpose of the action." *Geise v. Yarter*, 198 N.W. 359, 363 (Neb. 1924) (emphasis added).

[10] *See* Restatement (First) of Restitution § 65 cmt. d (1937) ("[I]n equity, . . . there need be no offer to restore antecedent to the proceedings."); Hugh S. Koford, *Rescission at Law and in Equity*, 36 Cal. L. Rev. 606, 607 (1948) ("Notice and offer to restore may be made in the suit in equity, but must precede an action at law.").

tinctions, but those distinctions softened or largely disappeared in practice.

### C. Courts Were Essential for Rescission at Law

Petitioners and the government portray rescission at law as self-executing, becoming effective before the plaintiff went to court, and accomplished without the court's involvement. They rely on suggestions that rescission was, in essence, a classic self-help remedy, available to any party having proper grounds to rescind and completed by unilateral action of that party. It was sometimes said that in equity, a party brought an action *for* rescission, but at law, a party sued "*on* rescission because the rescission had taken place before the parties went to court."[11] On that view, courts at law had no discretion to withhold or decree rescission, because the rescission would have already been achieved (assuming proper legal grounds existed) by the self-help actions of the claimant.[12] That view, however, does not reflect actual practice at common law, as the court's involvement was necessary and significant even under rescission at law.

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[11] Richard P. Goddard, *Judicial Erosion of the Rescission Right Under Truth in Lending*, 35 Wash. & Lee L. Rev. 979, 984 (1978) (emphasis added; internal quotation marks omitted); *see also* Restatement (First) of Restitution § 65 cmt. d.

[12] Black § 578, at 1356 ("Rescission is a fact, the assertion by one party to a voidable contract of his right (if such he has) to avoid it, and when the fact is made known to the other party, whether by a suit or in any other unequivocal way, the rescission is complete.") (quoting *Cunningham v. Pettigrew*, 169 F. 335 (8th Cir. 1909)).

"The idea that a suit at law is based on a completed rescission is pure conceptualism and outgrown legalistic dogma."[13] This point, observed nearly a century ago in the *Columbia Law Review*, remains true today. All rescission actions, whether at law or in equity, unavoidably enlist the court in determining whether a party is or should be entitled to rescind. As the recent Restatement (Third) of Restitution and Unjust Enrichment puts it, "the practical impossibility of a perfect two-way restoration—and the need to decide in every case how much leeway to permit—means that the availability of rescission depends to an important degree on judicial discretion."[14] Because the strict requirements of the at-law remedy are always, in essence, unachievable, "[t]he underlying test, once [judicial] discretion is acknowledged, is whether 'the interests of justice are served by allowing the claimant to reverse the challenged transaction instead of enforcing it.'"[15]

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[13] Note, *Necessity of Restitution in Suits for Rescission Based on Fraud*, 29 Colum. L. Rev. 791, 798 (1929).

[14] Restatement (Third) of Restitution and Unjust Enrichment § 37 cmt. a(3) (2011).

[15] Restatement (Third) of Restitution and Unjust Enrichment § 37 cmt. a (2011) (quoting *id.* § 54(4)). The referenced test concerns rescission for breached contracts, but a comparable result obtains in rescission for voidable contracts. *See id.* § 54 cmt. b. Rescission actions based on breach of contract are particularly susceptible to judicial discretion, since typically "the court must be persuaded that the advantages of rescission as an alternative to enforcement outweigh its costs in terms of contractual instability and potential forfeiture." *Id.* § 37 cmt. a.

In light of the practical imperative of judicial action, it would be incorrect to characterize the "at law" remedy as Petitioners and the Government do—*i.e.*, as effective with notice alone. That ignores, *inter alia*, the tender requirement—a principal means through which courts at law exercised authority in granting, conditioning or denying rescission. While there certainly are doctrinal descriptions of rescission at law as a *fait accompli* by the time the plaintiff first arrived at court, the historical practice reflected in case law makes it perfectly clear that the court's role in a rescission-at-law proceeding was broader than just the ministerial act of acknowledging the completed exercise of the unilateral power to rescind.

The source of the court's broader authority at law has already been observed, but bears repeating. "A perfect rescission would restore both parties to the status quo ante by specific restitution of property previously transferred, leaving no unjust enrichment, no loss to either party (apart from the defendant's loss of bargain), and no need for the court to place a value on benefits conferred."[16] Against this ideal, courts at law encountered actual parties whose tender or offer to tender fell short of perfectly restoring their counterparties to the status quo ante.[17] Hence a threshold question is presented to the court

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[16] Restatement (Third) of Restitution and Unjust Enrichment § 54 cmt. b (2011).

[17] *See, e.g.*, *Aron v. Mid-Continent Co.*, 8 N.W.2d 682, 684 (Neb. 1943) (holding that offer to tender shares of stock purchased after fraudulent inducement, but not dividends earned in connection with those shares of stock, constituted "a sufficient offer of restoration").

in almost every rescission-at-law action: do the facts and circumstances justify rescinding the contract in the case at bar notwithstanding the practical or legal limitations of the tender? "As a practical matter," observes the Restatement (Third) of Restitution and Unjust Enrichment, "a rule so stated gives a court of law nearly as much discretion to allow rescission or withhold it as the chancellors enjoyed in equity."[18]

In this critical respect, rescission at law and rescission in equity are much closer than suggested by abstract statements of the doctrines. In practice, the court's discretion to decree or deny rescission arises both in cases at law and cases in equity. No doubt this was a key reason why the latest Restatement of Restitution has abandoned entirely the categories of rescission "at law" and "in equity."[19] Yet, even when the categories were more broadly recognized and ac-

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[18] Restatement (Third) of Restitution and Unjust Enrichment § 54 cmt. b (2011). "Because a requirement of specific restitution by the claimant cannot be applied without a lengthy list of exceptions, and because restitution to the status quo ante is literally impossible in any event, the decision whether the claimant has come close enough to an unattainable standard becomes a decision about the propriety of rescission in the circumstances of the particular case." *Id.*

[19] "No distinction is recognized between rescission '"at law' and 'in equity.'" Restatement (Third) of Restitution and Unjust Enrichment § 54 cmt. j (2011). Additionally, the Restatement (Third) would eliminate the tender requirement and align the law on the sufficiency of grounds for rescission. *See id.* § 54 cmts. a, j. These and other changes from earlier Restatements also reflect a distinct view of rescission, in some respects, as a "composite remedy" of "rescission and restitution." Because the remedy entails restitution, the requirement of tender as a precondition to claim the right is lessened, while the necessity of establishing a substantive right is increased.

cepted, common law doctrine and practice did not regard notice alone as sufficient in either rescission action.

To be sure, at common law there were exceptions to the general requirement of tender, and when one of these exceptions applied, it might be claimed that a party could complete the rescission merely by having proper legal grounds and giving notice. For example, if the plaintiff had an independent entitlement to retain the subject of tender, or if the subject was owned or rightly possessed by a third party (for instance, in escrow), then tender was not required. Additionally, if the subject of any tender was continuously worthless or became sufficiently so, or perished or deteriorated to a great extent, then what's the sense tendering rotten tomatoes? Relatedly, if the counterparty would likely reject the tender (rotten tomatoes or otherwise) the court at law might forgive a failure to tender. Other exceptions to tender existed,[20] including when what would be tender "consists of money which can be credited if restitution is granted."[21]

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[20] Restatement (First) of Restitution § 65(f) (1937). For a description of general tender requirement and exceptions, *see* Restatement (First) of Restitution § 65, cmt. d; Henry C. Black, *A Treatise on the Rescission of Contracts and Cancellation of Written Instruments* § 564 (2d ed. 1929); Restatement (First) of Contracts § 480 (1932). Edwin W. Patterson, *Cases on Restitution: including Rescission, Reformation and Quasi Contract* 176-259 (Edmund M. Morgan et al. eds, 1950) (exceptions at 212).

[21] It was not money per se that released the obligation to tender; rather, it was the prospect of set-off. The Restatement (First) of Restitution offered the following illustration: "A owes B a sum which is uncertain, but *which is not less than $100*. By fraudulent representations A induces B to accept Blackacre

Apart from these exceptions, tender was the rule for a rescission at law under the common law. "In actions at law . . . the offer to restore is a necessary part of the manifestation of an election to rescind."[22] Moreover, even when an exception might be implicated, the active role of the court remained critical to the at-law remedy. Determination of whether and to what extent any case fell within the scope of an exception was itself subject to judicial discretion. In other words, not only were the exceptions limited to narrow circumstances, but they also did not remove the courts from the process. Cases reveal that relieving a plaintiff of the requirement of tender, whether through established or novel exceptions, normally required some exercise of discretion by a court. The courts' evaluation of the tender requirement in certain exceptional cases only demonstrates that rescission at law was not a self-effectuating remedy without further judicial involvement.

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with $100 in money, in exchange for Whiteacre and a release of the debt. B is entitled to rescission of the transaction upon tender of a deed to Blackacre without a tender of $100, which will be credited upon the original debt." Restatement (First) of Restitution § 65 cmt. a, illus. 8 (1937) (emphasis added); *see also id.* cmt. f, illus. 17-18. Case law also demonstrates that tender or offer to tender "is not necessary when the thing received is money which can be credited if restitution is granted." *Potucek v. Cordeleria Lourdes*, 310 F.2d 527, 532 (10th Cir. 1962), *cert. denied*, 372 U.S. 930 (1963); *see also Stilwell v. Hertz Drivurself Stations, Inc.*, 174 F.2d 714, 717 (3d Cir. 1949).

[22] Restatement (First) of Restitution § 65, cmt. d (1937). The offer need not be unconditional; it may be conditioned upon restitution by the other party since it is only by mutual restitution that the transaction is effectively rescinded. *Id.*

### D. Timing in Rescission Actions at Common Law

It is broadly recognized that a power to rescind at common law must be acted upon promptly and without unreasonable delay once the conditions giving rise to the power are known or should have been known to the party seeking to rescind. Failure to act with reasonable speed and diligence could destroy the power to rescind at common law. But if the point at which rescission must be *initiated* is settled, albeit by a standard, there remains some uncertainty surrounding when rescission is *completed*, particularly under the at-law remedy. In equity, the court's decree of rescission determines the moment when rescission is realized. At law, there are three possible moments when rescission may be deemed to have occurred: first, upon proper notice *and tender or offer of tender* to the counterparty; or second, at initiation of the action at law; or third, when the court renders its determination. Conventional articulation of doctrine favors the first determination, but the latter two moments remain plausible candidates, especially given the court's essential role in realizing rescission at law.

## CONCLUSION

Rescission at law, with limited exceptions, required tender or offer to tender as a condition precedent of rescission. Notice alone, as a sufficient condition for rescission, was not a feature of either the doctrine or practice at law. Moreover, abstract application of the at-law doctrine, suggesting that rescission was unilaterally completed at the moment of notice and tender, is belied by the prevalent and virtually inevitable discretion and authority exercised by

courts over the doctrine's application in practice. Judicial administration of rescission doctrine as applied in equity and law was never self-executing in the manner described by petitioners and the government.

Respectfully submitted.

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# AMICUS CURIAE BRIEF

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RECORD AND BRIEFS

IN THE

# Supreme Court of the United States

LARRY D. JESINOSKI, *et ux.*,

*Petitioners,*

v.

COUNTRYWIDE HOME LOANS, INC., *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF FOR THE STATES OF NEW YORK, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, INDIANA, IOWA, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, TENNESSEE, VERMONT, WASHINGTON, WEST VIRGINIA, AND THE DISTRICT OF COLUMBIA, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

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## QUESTION PRESENTED

The Truth in Lending Act provides that consumers who enter into credit transactions secured by their principal dwelling shall have the right to rescind the transaction until three business days after the delivery of legally mandated "information and rescission forms" by the creditor. 15 U.S.C. § 1635(a). A consumer exercises the statutory right of rescission "by notifying the creditor, in accordance with [governing] regulations," of his or her intent to rescind. *Id.* The Act further provides that a consumer's "right of rescission shall expire three years after consummation of the transaction." whether or not a creditor has made required disclosures by that time. *Id.* § 1635(f).

The question presented is:

Do consumers timely exercise rescission rights under the Act by notifying creditors of their intent to rescind within three years of consummation of a transaction, or must consumers both give notice and also file a lawsuit seeking rescission within three years of consummation of a transaction to prevent statutory rescission rights from expiring?

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## INTEREST OF THE AMICI STATES

Congress enacted the Truth in Lending Act (TILA) to ensure that consumers make informed decisions before entering into credit transactions—particularly credit transactions secured by a consumer's primary dwelling, which expose consumers to the risk of losing their homes through foreclosure. Amici States[1] have a compelling interest in ensuring effective enforcement of TILA, so that consumers fully understand the terms of a loan and their rights with respect to a loan before risking the loss of their homes.

Protecting homeownership is vital state policy. The family home is not only the single most important asset owned by most consumers; homeownership is also key to the social and economic well-being of neighborhoods and communities as a whole. The personal and public costs of losing homes in foreclosure are staggering. Families not only face devastating financial consequences, but foreclosed homes also reduce neighboring property values, destabilize communities, and erode the property tax base—widespread public harms that state and local governments struggle to mitigate.

Central to TILA's protective scheme is the consumer's statutory right of rescission. When a creditor materially violates TILA, consumers have three years from the date of the original transaction to exercise their right of rescission by giving written

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[1] The District of Columbia is not a State, but possesses a strong interest in this matter similar to those of the States. It is included in this brief's references to "amici States."

notice to creditors. 15 U.S.C. § 1635(a). TILA contains no language requiring consumers to *additionally* file a lawsuit to preserve their rescission rights. Imposing that additional hurdle would severely undermine the dual purposes of TILA rescission—to undo harm to injured consumers and, equally important, to create strong incentives for creditors to comply with TILA's straightforward disclosure mandates so that consumers may avoid unaffordable or unsuitable loans in the first place.

Preserving TILA's readily accessible right of consumer rescission is critical to advancement of the Act's purposes. In amici States' experience, few consumers realize that they have been the victims of TILA violations until several years after taking out a loan, both because it is difficult to ascertain violations if mandated disclosures are missing, and because it may not be obvious that key information, such as calculation of annual percentage rates of interest, is misstated. As a result, many consumers do not discover TILA violations until foreclosure is threatened, the first time when consumers may seek legal help. Legal representation is often unavailable, however, due to a severe shortage of attorneys to represent consumers in foreclosure. Thus, in practice, requiring consumers to sue within three years of a loan would bar consumers in many cases from exercising valid rescission rights—preventing effective enforcement of TILA's mandatory disclosure obligations altogether. Requiring a lawsuit would also dilute the deterrent function of rescission by shifting the burden of litigation solely to consumers when creditors can also file court actions after receiving notice of rescission—and are far better

equipped to do so—to resolve any dispute about a consumer's right to rescind.

Amici States strongly support a plain-meaning interpretation of TILA that ensures that TILA rescission is readily accessible to consumers, as Congress intended. TILA rescission rights are key to protecting consumers under both federal and state consumer protection laws: TILA is the primary protection for consumers entering into covered mortgage transactions, and many state consumer-protection statutes expressly incorporate TILA's rescission remedy.[2] As a result, an improperly restrictive reading of TILA not only undermines federal protections; it also undermines the remedial schemes of a wide range of state statutes regulating lending and other consumer transactions.

Protecting consumers from mortgage- and foreclosure-related abuses is one of the highest enforcement priorities for amici States. In 2012, for example, the Attorneys General of forty-nine States entered into a landmark $25 billion federal-state settlement with mortgage servicing companies to remedy past mortgage-loan servicing and foreclosure abuses. Many individual States have also pursued

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[2] *See, e.g.*, Ark. Code § 23-53-106 (incorporating TILA's "right of rescission" into state-law recoupment remedy under Arkansas Home Loan Protection Act); Colo. Rev. Stat. § 5-3.5-201 (incorporating TILA's rescission remedy into Colorado Consumer Equity Protection Act); Ind. Code § 24-4.5-5-204 (making a violation of TILA's right of rescission a violation of Indiana Uniform Consumer Credit Code); Ohio Rev. Code § 1345.09(C)(2) (incorporating TILA's rescission remedy, including expiration period imposed by § 1635(f), into Ohio Consumer Sales Protection Act).

significant enforcement actions against creditors and mortgage servicers for lending- and foreclosure-related violations. But state and federal officials lack the resources to pursue and deter all potential violations related to home loans or mortgage lending—the very reason that TILA (and parallel state statutes) empower consumers to act as private attorneys general when creditors violate the law. Both federal and state law depend upon robust private enforcement to ensure compliance with truth-in-lending and other statutory protections, and Congress made rescission a centerpiece of TILA's remedial and deterrent scheme. Restricting consumers' ability to seek rescission beyond TILA's express language would leave a sweeping enforcement gap that amici States could not feasibly fill.

## STATEMENT OF THE CASE

Congress enacted TILA in 1968 to protect consumers against unfair credit practices.[3] *See* 15 U.S.C. § 1601(a). The Act requires creditors to provide borrowers with clear and accurate disclosures of credit terms (such as annual percentage rates of interest) before a credit transaction is consummated. *Id.* §§ 1631-1632, 1635, 1638. Although TILA provides for public enforcement by both federal and

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[3] TILA is implemented by Regulation Z, as promulgated by the Bureau of Consumer Financial Protection (CFPB). *See* 12 C.F.R. pt. 226; Truth in Lending (Regulation Z), 76 Fed. Reg. 79,768, 79,803-04 (Dec. 22, 2011) (promulgated at 12 C.F.R. § 1026.23)).

state officials,[4] the Act primary relies on private enforcement by consumers to deter violations and police creditors. *See, e.g., McGowan v. King, Inc.*, 569 F.2d 845, 848-49 (5th Cir.1978) (explaining that TILA is designed to foster enforcement through a system of private attorneys general). To encourage private enforcement, TILA provides consumers with remedies for both actual and statutory damages and awards attorney's fees to consumers who prevail in establishing a TILA violation in court. 15 U.S.C. § 1640(a).

In addition to damages, TILA also grants consumers rescission rights when they enter into credit transactions that pledge their "principal dwelling" as security. *Id.* § 1635(a). The rescission right reflects Congress's intent to prevent consumers from placing their homes in jeopardy for loans and other credit transactions without a clear understanding of the potential risks of the underlying transaction.[5] *See* S. Rep. No. 96-368, at 28 (1980), *reprinted in* 1980 U.S.C.C.A.N. 236, 264. To ensure that consumers make a deliberate and informed choice, and that consumers can reconsider their choice after full disclosure of loan terms, TILA grants consumers an absolute three-day cooling-off period during which the consumer may rescind covered transactions for

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[4] *See* 15 U.S.C. § 1607 (providing for enforcement by federal agencies); *id.* § 1640(e) (providing for enforcement by state Attorneys General).

[5] TILA rescission rights do not apply to purchase-money mortgages (mortgages financing the initial purchase of a home), 15 U.S.C. §§ 1602(x), 1635(e)(1), presumably because such loans enable consumers to become homeowners rather than risking the loss of an already-owned home.

any reason merely by giving notice to creditors. 15 U.S.C. § 1635(a). Creditors are responsible for "clearly and conspicuously" disclosing a consumer's right to rescind and for providing "appropriate [rescission] forms" to the consumer. *Id.*

As initially enacted, TILA placed no time limit on consumer rescission where a creditor failed to make statutorily mandated disclosures about the terms of the loan or the consumer's right to rescind. If a creditor failed to comply with TILA, the consumer had an open-ended right to rescind and had no deadline to provide notice of rescission to the creditor. *See* Consumer Credit Protection Act, Pub. L. No. 90-321, tit. I, § 125, 82 Stat. 146, 152-53 (1968). In 1974, Congress amended TILA in response to concerns that an unrestricted right of rescission might potentially cloud title to residential properties. To address potential clouds on title, Congress added a new subsection (f) to 15 U.S.C. § 1635. *See* Pub. L. No. 93-495, tit. IV, § 405, 88 Stat. 1500, 1517 (1974). Under § 1635(f), if no government enforcement proceeding is pending, the consumer's right to rescind "expire[s] three years" after the consummation of a covered transaction, or upon the sale of the property, "whichever occurs first," even if the creditor fails to make required disclosures within the three-year period.

Although Congress established a new three-year expiration period, Congress did not alter the procedures for exercise of TILA's rescission remedy, which were designed to make the rescission process uncomplicated, easily accessible, and consumer-friendly. A consumer exercises the right to rescind under TILA simply by giving written notice to the creditor. *See* § 1635(a); 12 C.F.R. §§ 1026.15(a)(2),

1026.23(a)(2). Once a consumer exercises his right to rescind by sending notice, he "is not liable for any finance or other charge, and any security interest given by [him] . . . becomes void." 15 U.S.C. § 1635(b). Written notice of rescission also triggers a set of default statutory procedures for unwinding the loan transaction, which, absent modification by a court, require the creditor to take steps to terminate its security interest and require consumer to return (*i.e.*, "tender") all loan proceeds back to the creditor.[6] *Id.*

The TILA rescission "process is intended to be [a] private," out-of-court remedy "with the creditor and debtor working out the logistics of a given rescission." *McKenna*, 475 F.3d at 421. In some cases, however, the parties will not be able to work out a voluntary resolution: the creditor may dispute or deny the consumer's right to rescind; a creditor may also simply ignore or refuse to respond to the consumer's rescission notice; the parties may also agree to rescind in principle but disagree over proper rescission procedures. When rescission is contested for whatever reasons, either party—the consumer or the creditor—may bring an action to enforce or clarify TILA rescission rights. *Id.* at 422.

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[6] Because of the tender requirement, not all consumers "who suspect (or know) that they have been subjected to a TILA violation will choose to rescind." *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 421-22 (1st Cir. 2007). Tender of loan funds may not be feasible if the consumer has used loan funds to pay off credit-card or other outstanding debt. Likewise, tender may not be possible because the consumer's house has less current market value than the amount of the loan—preventing the consumer from selling the house or obtaining a refinancing loan.

TILA does not expressly limit the time period for bringing such suits. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998) (noting that § 1635(f) does not address time for "bringing an action" nor contain language governing "a suit's commencement"). Some courts, including the Eighth Circuit in this case (Pet. App. 2a), have nonetheless concluded that § 1635(f) requires consumers to file suit within three years of consummation of a credit transaction to exercise TILA rescission rights. Other courts have held instead that the provision of written notice to the creditor within three years is sufficient to satisfy § 1635(f) even if a later court judgment is necessary to enforce TILA rescission rights. *See, e.g., Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255, 258 (3d Cir. 2013).

## SUMMARY OF THE ARGUMENT

The plain language, structure, and purpose of TILA establish that consumers exercise their right of rescission under the Act by providing written notice to the creditor within three years after the consummation of a loan. *See* Pet. Br. 14-30. In contested rescission cases, creditors or consumers may also seek a judicial ruling to determine the validity of a consumer's rescission demand, or to alter TILA's default, nonjudicial procedures for carrying out rescission. But Congress did not draft § 1635(f) to require consumers to file such lawsuits in order to timely exercise their TILA rescission rights.[7]

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[7] This case does not involve, and amici States take no position on, the statute of limitations that should apply to suits to enforce timely exercised TILA rescission rights. TILA itself provides no express limitations period for actions regarding rescission, and courts have taken a variety of approaches in

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The courts that have reached the opposite conclusion have justified their departure from § 1635(f)'s plain text by citing generic (and unproven) creditor assertions about the need to limit rescission to prevent clouding of title for residential properties. *See, e.g.*, *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 727-28 (8th Cir. 2013) (citing and adopting cloud-on-title rationale of *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1184-85 (10th Cir. 2012)), *pet. for cert. filed*, 82 U.S.L.W. 3383 (Dec. 9, 2013) (No. 13-705). Amici States submit this brief to make three points about why such cloud-on-title concerns are an inappropriate ground for implying additional restrictions on consumer rescission rights beyond the express limitations that Congress included in TILA.

*First*, Congress specifically addressed creditors' concerns about clouds on title by requiring borrowers to give notice of their intent to rescind within three years of a transaction's consummation—a time limitation not present in the original enactment of TILA. If such notice does not give creditors sufficient certainty, creditors may file suit to obtain a ruling on whether rescission is available without waiting for the consumer to initiate a court action, as creditors routinely do in both state and federal court. *Second*, there is nothing unusual or unworkable about Congress authorizing rescission suits beyond the three-year exercise period provided under 15 U.S.C.

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considering the timeliness of TILA rescission actions, including borrowing TILA's one-year limitations period for damages claims, 15 U.S.C. § 1640(e). *See, e.g., Stewart v. BAC Home Loans Servicing, LP*, No. 10-cv-2033, 2011 WL 862938, at *6 (N.D. Ill. Mar. 10, 2011) (listing cases applying one-year statute of limitations).

§ 1635(f). State consumer-protection laws grant consumers comparable rescission rights for home loans and provide for rescissionary periods longer than three years, but no actual clouding-of-title concerns have arisen in States with such laws. *Third*, TILA's rescission remedy serves a deterrent as well as a remedial purpose. The availability of statutory rescission not only protects consumers in cases where creditors fail to make legally mandated disclosures, but also deters creditor violations in the first place. Creditors can file suit to clarify title after receiving a consumer's rescission notice. Shifting the burden from creditors to consumers to sue to avoid potential clouds on title, however, dilutes the deterrent effect of TILA rescission rights, thus hampering the private enforcement scheme Congress intended.

## ARGUMENT

### I. TILA's Timely-Notice Requirement Already Ensures That Creditors Can Resolve Title Disputes Promptly.

In *Beach*, this Court noted that § 1635(f)'s time limitation for exercising the right of rescission makes "good sense" because the "statutory right of rescission could cloud a bank's title on foreclosure." 523 U.S. at 417-18. But nothing in *Beach* or in the text or history of § 1635(f) suggests that concerns about clouded title require consumers to go to court to exercise their right to rescind, rather than simply giving notice of rescission to a creditor. To the contrary, TILA's requirement that consumers give notice of rescission within three years after the origination of a loan adequately prevents delayed rescission claims from clouding title.

Congress amended TILA in 1974—adding 15 U.S.C. § 1635(f)—specifically to address concerns about clouds on title to residential properties. When first enacted, TILA contained no timely notice requirement in cases where the creditor had failed to make material disclosures. As a result, a consumer effectively faced no deadline to exercise his or her right to rescind, even years after the origination of a loan, because the consumer's time to seek rescission (by giving notice of rescission to the creditor) did not run until the creditor's actual delivery of legally mandated disclosures. *See* Consumer Credit Protection Act, § 125, 82 Stat. at 152-53. The general concern raised in 1974 was that this open-ended right of rescission could potentially cloud title to residential real estate properties indefinitely due to ongoing "uncertainty" about valid, yet-unexercised consumer rescission claims. *See* Bd. of Governors of Fed. Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1972,* at 19 (Jan. 3, 1972) (cited in *Beach*, 523 U.S. at 419).

The 1974 amendments to TILA resolved these cloud-on-title concerns by limiting consumers' rescission rights in two key ways. As one safeguard, Congress provided that any statutory "right of rescission shall expire . . . upon the sale" of the consumer's home, 15 U.S.C. § 1635(f), thereby cutting off any rescission remedy potentially affecting title if ownership of the underlying property changes hands. The regulations implementing TILA clarify that other transfers of the consumer's home, such as

transfer through gift or bequest, also cut off a consumer's time to exercise rescission rights.[8]

Even without a sale, § 1635(f) imposes a timely-notice requirement, arming creditors with the information necessary to resolve any title disputes or issues. Unlike the original version of TILA, § 1635(f) imposes a three-year deadline for consumers to exercise their rescission rights. If consumers do not exercise their right to rescind by giving written notice to the creditor, the statutory right of rescission "expire[s] three years" after the consummation of the relevant loan transaction—whether or not proper TILA disclosures were made. 15 U.S.C. § 1635(f). Requiring notice to creditors within a three-year expiration window thus eliminates the uncertainty under the pre-amendment Act by guaranteeing that creditors will know within three years whether a consumer will seek rescission.

Banks (including defendants here) have complained that mere notice does not provide sufficient certainty when there is a dispute over whether the consumer has a right to rescind at all, because only a judicial proceeding may resolve such a dispute. *See* Response to Cert. Pets. 24-27. But nothing prevents creditors themselves from taking immediate steps to resolve disputes to title, including by seeking a court ruling on the validity of the consumer's rescission claim. Creditors routinely file such actions

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[8] *See* Official Interpretations, 12 C.F.R. pt. 1026, supp. I, §§ 1026.15(a)(3)-(4), 1026.23(a)(3)-(4) (CFPB); Official Staff Interpretations, 12 C.F.R. pt. 226, supp. I, §§ 226.15(a)(3)-(4), 226.23(a)(3)-(4) (Federal Reserve Board).

in both state[9] and federal court.[10] Given creditors' ability to sue for relief themselves, there is no danger that exercise of TILA rescission rights could "cloud the title of the property for an *indefinite period* of time." *Rosenfield*, 681 F.3d at 1187 (emphasis added). To the extent creditors want certainty over title, TILA's three-year notice requirement ensures that lenders can file suit to obtain definitive resolution of consumer rescission demands made within a fixed and certain period after closing of a loan.

Requiring *consumers* to sue to exercise rescission rights, as the court below held, is not a more effective tool for clarifying title disputes. A lawsuit does not put "a definitive end to the uncertainty" about the enforceability of a lender's mortgage lien, nor guarantee timely resolution of disputes over title. *See* Response to Cert. Pets. 8. Commencing litigation simply moves the dispute over TILA rescission into

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[9] *See, e.g., Fin. Freedom Senior Funding Corp. v. Fischer*, No. L–5900–08, 2011 WL 1161123 (N.J. Super. Ct. App. Div. Mar. 31, 2011); *Cornerstone Mortg., Inc. v. Ponzar*, 254 S.W.3d 221 (Mo. Ct. App. 2008); *Pac. Shore Funding v. Lozo*, 138 Cal. App. 4th 1342 (2006); *Aames Capital Corp. v. Sather*, No. C9-99-1435, 2000 WL 343218 (Minn. Ct. App. Apr. 4, 2000).

[10] *See, e.g., Bank of Am., N.A. v. Peterson*, 746 F.3d 357 (8th Cir. 2014); *Am. Mortg. Network, Inc. v. Shelton*, 486 F.3d 815 (4th Cir. 2007); *Decision One Mortg. Co. v. Fraley*, No. 00-3270, 2000 WL 1889700 (6th Cir. 2000); *WMC Mortg. LLC v. Baker*, No. 10-cv-3118, 2012 WL 628003 (E.D. Pa. Feb. 28, 2012); *Aurora Loan Servs., LLC v. Britton*, No. 08–cv–1535, 2009 WL 2501192 (E.D. Cal. Aug. 14, 2009); *Aurora Loan Servs., LLC v. Lucero*, No. 08-cv-950, 2009 WL 2485356 (S.D. Cal. Aug. 12, 2009); *AFS Fin., Inc. v. Burdette*, 105 F. Supp. 2d 881 (N.D. Ill. 2000); *New Me. Nat'l Bank v. Gendron*, 780 F. Supp. 52 (D. Me. 1991).

court where final adjudication of a consumer's rescission rights might occur far after § 1635(f)'s three-year expiration deadline. As a result, a consumer-suit requirement does not end uncertainty about title by a known and defined date; it simply shifts the burden of suits to clear title from creditors to consumers. But nothing in TILA suggests that Congress intended to protect bank interests—even for banks that materially violated TILA—by compelling injured consumers to sue to clear bank title once consumers have provided written notice of rescission. TILA was enacted to protect consumers, not to ensure that creditors have maximal commercial certainty at the expense of consumers' rescission remedies when creditors violate TILA's disclosure requirements.

Nor would shifting the burden of litigation to consumers make sense, given the imbalance of resources between creditors and consumers. Creditors are generally far better situated to pursue litigation in cases where genuine concerns over title arise. In sharp contrast, there is a severe shortage of attorneys who are willing and able to represent consumers in foreclosure proceedings (when defects in creditors' disclosures are usually discovered), and nonprofit and other publicly funded legal services programs cannot meet the urgent needs of all consumers facing foreclosure. Many consumers are simply unable to obtain the legal help they need. *See, e.g.*, Brennan Ctr. for Justice, *Foreclosures: A Crisis in Legal Representation* (2009).

Shifting the burden to consumers to sue thus does more than cut off a consumer's time to exercise TILA rescission rights: it makes the exercise of that right substantially more difficult, and may

undermine it altogether, regardless of whether a genuine dispute over title is present. Instead of mitigating uncertainty, a sue-to-prevent-expiration rule overwhelmingly tips the balance in favor of creditors, who would be shielded not only from disputed rescission claims, but also from indisputably valid rescission claims where timely notice was given but the consumer failed to take the additional, non-statutorily-mandated step of suing for rescission. Such an erroneous interpretation of TILA would impair rescission rights drastically beyond what is necessary to fully address the theoretical problem of clouds on residential property.[11]

## II. State Laws Confirm That Longer Statutory Rescission Periods Are Workable and Do Not Hamper Lending Transactions.

While citing generic cloud-on-title concerns, banks seeking to restrict consumer rescission rights have never explained concretely how TILA rescission potentially clouds title if timely notice of rescission is given. The courts that have required consumers to sue for rescission within three years of consummation of loan have often accepted the banking

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[11] Because a consumer's written notice of rescission under TILA sets in motion a series of default procedures for unwinding a loan transaction, including automatic voiding of a security interest, 15 U.S.C. § 1635(b), some courts have expressed concern that consumers will unfairly profit by sending baseless rescission notices. *See, e.g., Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1172 (9th Cir. 2003). But TILA's procedures apply only if the consumer asserts a legitimate right to rescind. If the consumer lacks statutory grounds for rescinding, the creditor's security interest remains intact and unaffected by a rescission notice.

industry's claim that suits for rescission beyond a three-year window are commercially unworkable. *See Rosenfield*, 681 F.3d at 1187; *see also* Br. of Am. Bankers Ass'n et al. as Amici Curiae Supporting Appellees 13-14, *Rosenfield*, 681 F.3d 1172 (No. 10-1442), 2012 WL 1656043.

But TILA's rescission remedy is not unique: state consumer-protection laws often grant longer, and even open-ended, statutory rescission rights in cases where consumers fail to receive legally mandated disclosures. The States' experience with four-year, five-year, and longer statutory rescission periods refutes the banking industry's assertion that any rescission window beyond three years is commercially unviable or would lead to vast disruption of lending and credit transactions due to systematic clouding-of-title problems.

For example, under the Massachusetts Consumer Credit Cost Disclosure Act, which governs lending transactions in Massachusetts in place of TILA,[12] consumers have up to four years to exercise statutory rescission rights by giving written notice if a lender fails to make material disclosures. Mass. Gen. Laws ch. 140D, § 10(f). There is no evidence that the longer rescission period in Massachusetts, which has been in place since 1981, *see* Ch. 733, § 2, 1981 Mass.

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[12] States may request an exemption from TILA's requirements if state laws protect consumers by imposing disclosure requirements that are substantially similar to federal law. *See* 15 U.S.C. §§ 1633, 1666j, 12 C.F.R. §§ 226.29, 1026.29. Massachusetts is one of five States that have been granted exemption from TILA requirements. *See* 12 C.F.R. pt. 1026, supp. I, § 1026.29(a).

Acts 1143, 1155, has hampered lending or other credit transactions or in any way led to systematic clouding-of-title problems.

Likewise, other States have enacted specific laws to protect consumers from high-cost or subprime home loans by permitting rescission well after three years. Under the New York Banking Law, for example, the "remedy of rescission shall be available as a defense *without time limitation*" for certain high-cost home loans upon a judicial finding that the loan violates statutory requirements. N.Y. Banking Law § 6-*l*(11) (emphasis added). Other States give borrowers up to five years from consummation of a covered loan to seek rescission. *See, e.g.*, Ga. Code § 7-6A-7(e) (granting borrowers five years to seek rescission of a high-cost home mortgage loan); Mass. Gen. Laws ch. 183C, §§ 15(b)(1), 18(c)(1) (same).

Similarly, States have enacted home-equity protection laws governing the sale of homes in foreclosure that extend unlimited statutory rescission rights to homeowners in cases where purchasers fail to comply with statutory disclosure requirements. *See* Cal. Civ. Code § 1695.5(d) (homeowner has right to cancel sale until purchaser provides homeowner with required notice of right to cancel); Md. Code Real Property § 7-311(f) (homeowner's time for rescinding sales contract "does not begin to run until the purchaser has complied" with statutory requirements).

Finally, all fifty States have enacted cancellation remedies for in-home solicitation sales—*i.e.*, sales of goods or services arising from personal solicitation of a consumer at his or her residence. Nat'l Consumer Law Ctr., *Truth in Lending* § 10.2.10, at 609 (8th ed.

2012). Many state statutes provide no limitation on consumers' right to cancel so long as the seller fails to provide proper disclosures.[13] These continuing cancellation rights may overlap with TILA rescission rights when a security interest on a consumer's home arises from a home solicitation sale. *See id.*; *see also* Ky. Rev. Stat. § 367.420(6) ("for home solicitation sales on loans in which a security interest is taken in the principal dwelling of the buyer, the buyer shall have the right to rescind or cancel the transaction until . . . delivery of the material disclosures required under the Truth in Lending Act"). Continuing rights of rescission are also common under other state statutes extending protections to consumers in home-lending transactions.[14]

It is thus far from unusual or aberrant that Congress chose to permit rescission under TILA more than three years after consummation of a loan, so long as the consumer provided written notice to the creditor within that time period. Such a rescission right operates little differently from the comparable remedies that many States have adopted. In this

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[13] *See, e.g.*, 815 Ill. Comp. Stat. 505/2B (three-day statutory cancellation right "does not commence" until seller complies with statutory requirements for furnishing consumer with notice of cancellation form); Vt. Stat. tit. 9, § 2454(b)(3) (same); *see also* Nat'l Consumer Law Ctr., *Federal Deception Law* § 2.5.6.3, at 27 (2012) (discussing continuing rights of rescission under state law).

[14] *See, e.g.*, Okla. Stat. tit. 14A, § 5-204(1) (providing continuing right of rescission for loans secured by consumer's home until creditor delivers statutorily required information and forms); Tex. Code Occ. § 1201.162(c) (providing continuing right of rescission for manufactured-home transactions until retailer complies with statutory disclosure requirements).

case, for example, petitioners exercised their right to rescind under TILA by sending written notice within § 1635(f)'s three-year time limit and then filing suit in federal court one year later. Pet. Br. 8-9. Petitioners' lawsuit was thus brought within four years of the closing of their mortgage refinancing loan, the same rescission period Massachusetts grants under its state-law TILA analogue. Contrary to the banking industry's speculation about theoretical cloud-on-title problems, a four-year rescission period has proved commercially viable in Massachusetts for the last thirty-three years. Banks have not declined to make loans to Massachusetts consumers for fear that rescission claims will render their mortgage liens uncertain; nor has a longer consumer rescission window created any real-world confusion over title to residential properties in Massachusetts. As state law thus demonstrates, a rescission window beyond three years for unwinding a loan transaction does not so cloud title as to render such a remedy commercially impractical.

## III. Requiring Consumers to File Court Actions to Timely Exercise TILA Rescission Rights Would Improperly Dilute the Deterrent Purpose of TILA's Rescission Remedy.

Limiting TILA rescission rights to accommodate lender concerns about the financial burdens of consumer rescission is also inappropriate for another fundamental reason. TILA's remedial scheme was designed to deter and prevent disclosure violations by creditors. *See Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475, 480 (5th Cir. 1995) (quoting *Williams v. Public Fin. Corp.*, 598 F.2d 349, 356 (5th Cir. 1979)). And, rather than relying solely on government

enforcement efforts, Congress deliberately provided remedies to consumers to encourage consumers to act as private attorneys general in enforcing TILA's disclosure requirements. Thus, for example, TILA entitles consumers to collect statutory damage awards, even when they suffered no actual damages. *See* 15 U.S.C. § 1640(a)(2)(A), (3).

Like statutory damages, TILA's extended right of rescission also encourages consumers to police lender conduct. Rescission is uniquely important, however, and central to TILA's deterrent scheme because it serves a function not replicated by other TILA remedies. Recovery of actual damages under TILA generally requires proof of detrimental reliance, a difficult showing for consumers to establish. *See, e.g., Turner v. Beneficial Corp.*, 242 F.3d 1023, 1028 (11th Cir. 2001) (en banc). Although statutory damages are available without proof of reliance, TILA caps statutory damages awards to only $4,000 for credit transactions secured by a consumer's home—a relatively low amount that limits consumer incentives to enforce TILA. *See* 15 U.S.C. § 1640(a)(2)(A)(iv). In addition, TILA damages are frequently unavailable to consumers for practical reasons. In amici States' experience, many consumers fail to realize that TILA violations have occurred until a threatened foreclosure or impending bankruptcy forces them to seek legal help. But TILA requires that damages claims be brought within a year of a creditor's violation, *see id.* at § 1640(e), a time limitation that frequently precludes damages recovery.[15]

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[15] The one-year limitation does not bar consumers from asserting TILA damages claims "as a matter of defense by

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Rescission is also particularly important as a means for deterring TILA violations because many mortgage loans are sold on the secondary market or securitized, effectively exempting the loans from consumer damages claims. In many cases, the original lender goes out of business or becomes insolvent after selling the loan. Assignees are liable under TILA only if the original creditor's TILA violations were apparent on the face of loan disclosure statements—an exceedingly difficult standard to meet. *Id.* § 1641(a), (e). Indeed, one of the very purposes of securitization is to insulate parties from responsibility for the liability-producing conduct of the original lender by taking advantage of assignee-liability limitations. *See, e.g.*, Lynn M. Lopucki, *The Death of Liability*, 106 Yale L.J. 1, 23-30 (1996). Congress specified, however, that consumers may exercise TILA rescission rights "against any assignee," 15 U.S.C. § 1641(c), thus ensuring that rescission would remain as a deterrent even if a mortgage loan is sold or securitized. The potential for rescission also gives the secondary mortgage market strong incentives to police loan originators to prevent threshold TILA violations.

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recoupment or set-off'" in foreclosure proceedings or other actions to collect a debt. *Beach*, 532 U.S. at 418 (quoting 15 U.S.C. § 1640(e)). But consumers would face the same difficulties in establishing actual damages and be limited to same statutory damages caps. Moreover, damages are of limited help once a consumer is facing the irreparable harm of losing his or her home, and damages do not remedy the widespread public harm of home foreclosures. See *supra* at 1.

For all of these reasons, rescission may be the only practical remedy in many cases and, as a result, the only effective way to hold lenders accountable for faulty consumer disclosures. Moreover, because the purpose of rescission is deterrence as well as restoration, the difficulty or expense of unwinding a loan transaction is not an independent reason to restrict TILA rescission rights. *See* Response to Cert. Pets. 29-30. The fact that lenders may find it onerous to unwind a loan transaction—and fear that consumers will readily seek rescission because TILA requires only written notice to exercise statutory rescission rights—confirms that rescission is serving its intended deterrent function. Rescission may be strong medicine, and defending against rescission demands may impose burdens on creditors, but that should motivate lenders to make true and accurate disclosures and keep careful records to respond to and refute consumer rescission claims if necessary.

By contrast, adding a consumer litigation requirement to § 1635(f) substantially reduces creditor compliance incentives. There is a direct correlation between the accessibility of TILA's rescission remedy to consumers and its power to incentivize due diligence on the part of lenders. TILA was drafted to make rescission a private, out-of-court process. *See, e.g., Belini v. Wash. Mut. Bank*, 412 F.3d 17, 25 (1st Cir. 2005). A consumer-suit requirement would place rescission out of reach for many consumers due to delayed discovery of TILA violation and the difficulties consumers face in obtaining legal help and representation. See *supra* at 2, 14, 20. Sending written notice, as the statute specifies, presents far fewer burdens, especially if consumers are nearing § 1635(f)'s three-year exercise deadline when they

discover TILA violations. Additional time beyond three years to file suit further removes creditor incentives to stall or ignore consumer rescission notices in hopes that consumers will not sue in time.[16] Adherence to the plain language of § 1635(f) also gives consumers critical time to obtain legal assistance and ensures that attorneys representing consumers can preserve the rights of more consumers rather than devoting resources to pursuing individual rescission actions to avoid a potential TILA time bar.

To be sure, there are many potentially different ways to balance the remedial and deterrent purposes of rescission, and Congress could have required consumers to file suit to preserve rescission rights under § 1635(f). But § 1635(f) does not contain the clear language that Congress included in other statutes to impose a strict time limitation for actions to enforce statutory rescission rights. The federal Interstate Land Sales Full Disclosure Act (ILSFDA), for example, protects consumers by mandating certain disclosures for the sale or lease of lots in subdivision when sales are effectuated through use of interstate commerce or mail. Similar to TILA, the ILSFDA grants consumers an absolute right to

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[16] Many cases interpreting § 1635(f) involve instances where lenders simply ignored consumers' written rescission notices. *See, e.g.*, *Rosenfield*, 681 F.3d at 1176 (bank failed to respond to rescission notice). In other cases, banks stalled in rescinding transactions—for example, by negotiating with a consumer, eventually refusing to rescind, and then seeking to bar the consumer's later rescission action as time-barred. *See, e.g.*, *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1326-27 (9th Cir. 2012)

revoke a purchase agreement within seven days of signing of a contract, 15 U.S.C. § 1703(b), and extends that right by two years if a developer fails to make statutorily mandated disclosures at the time of sale. *Id.* § 1703(c)-(d). But unlike in TILA, Congress expressly clarified that "[n]o *action* shall be maintained" to enforce consumer revocation rights "unless brought within three years after the signing of the contract or lease," *id.* § 1711(b) (emphasis added), specific and affirmative language distinguishing between timely exercise of statutory revocation rights and suits to enforce the revocation.

Comparable language is absent from TILA. Inferring a limitation that Congress did not impose because "banks must be protected from the possibility that a foreclosed home could have a 'cloudy title' because of a delayed rescission claim by a borrower," *Rosenfield*, 681 F.3d at 1177, ignores that Congress may well have considered and accepted that risk—in fact intended that possibility as an extra spur for banks to scrupulously comply with TILA's disclosure requirements. Creditors are free to make their policy arguments to Congress, but until Congress acts, TILA's consumer rescission remedy should not limited so as to dilute its deterrent effect and central place in TILA's remedial scheme.

## CONCLUSION

This judgment of the court of appeals should be reversed.

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# AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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IN THE

# Supreme Court of the United States

LARRY D. JESINOSKI, ET UX.,

*Petitioners,*

v.

COUNTRYWIDE HOME LOANS, INC., ET AL.,

*Respondents.*

On Writ of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

## BRIEF FOR *AMICUS CURIAE* STRUCTURED FINANCE INDUSTRY GROUP, INC. IN SUPPORT OF RESPONDENTS

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## INTERESTS OF THE *AMICUS CURIAE*[1]

The Structured Finance Industry Group, Inc. ("SFIG") is a member-based trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market. SFIG has over 250 members from all sectors of the securitization market, including investors, issuers, financial intermediaries, accounting, law, and technology firms, rating agencies, servicers, and trustees. SFIG was established with the core mission of supporting a robust and liquid securitization market, recognizing that securitization is an essential source of core funding for the real economy.

Regulations governing residential mortgages have a significant impact on the structured finance and securitization market. In fact, over 60% of the home mortgages originated in the United States are securitized. The interpretation of Section 1635 of the Truth in Lending Act ("TILA") espoused by Petitioners and certain other *amici* would have a destabilizing impact on the market for private label residential mortgage-backed securities ("RMBS")

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[1] No counsel for a party or a party to this proceeding authored this brief, in whole or in part, and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than *Amicus Curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and Respondents have filed with this Court blanket consents to the filing of *amicus* briefs.

and, in turn, the residential mortgage market more generally.

Although SFIG's members' participation in the securitization market gives them a unique interest in the outcome of this case, the impact that residential mortgage regulations have on securitization markets are not only felt by those parties directly involved with mortgage-backed securities, but rather, are borne by *all participants*—borrowers included. A vibrant environment for private label RMBS infuses additional capital into the residential mortgage market, thus making it easier for all borrowers to obtain mortgages at a favorable interest rate and reducing the burden of taxpayers currently bearing the cost of government-sponsored residential mortgage securitization, which now represents a substantial majority of funding provided for residential mortgages.[2]

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[2] There are generally two types of RMBS based on the issuer of the security: RMBS issued or guaranteed by government-sponsored enterprises ("GSEs"), such as Fannie Mae, Freddie Mac, and Ginnie Mae, and private label RMBS issued by market participants such as banks or other entities. The securitization process described herein, *see infra* Part I.A.1, is specific to private label RMBS.

Because they do not typically have to meet the same requirements as the GSEs, issuers of private label RMBS have more flexibility with respect to the loans they may securitize. Thus, private label RMBS will typically contain different or specialized types of mortgage loan pools that do not qualify for agency RMBS, including loans with balances that exceed the amount that the GSEs are allowed to purchase by statute. Private label RMBS, under the right market conditions, can infuse more capital into the markets, reduce the governmental

The United States Court of Appeals for the Eighth Circuit was correct when it ruled that where a lender disputes the existence of a right to rescind, a borrower cannot unilaterally void his mortgage merely by notifying the creditor of his intent to do so. SFIG believes that reversing the Eighth Circuit's ruling (or agreeing with Petitioners) would have a detrimental impact on the mortgage lending market, private label RMBS liquidity, and the U.S. economy.

In particular, SFIG and its constituents are concerned that a reversal of the ruling would call into question representations and warranties ("R&Ws") contained in RMBS transactions regarding mortgage loans, which would result in a significant number of repurchases and pointless repurchase demands, and create the potential for a significant increase in litigation and liability—in a market which has borne the brunt of a never-ending stream of litigation over the past few years. Also, to the extent that post-rescission-notice mortgage loans remain in the trust, SFIG is interested in making certain that participants in private label RMBS transactions can be confident in the enforceability of creditors' security interests in the property acting as collateral for the securitized pool of mortgages. SFIG is concerned about the implications of a statutory interpretation that would allow a borrower to instantly and unilaterally terminate a creditor's security interest, even where the borrower's right to do so is disputed. SFIG is also concerned that a ruling for Petitioners would force its members to

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footprint in the mortgage market, and decrease taxpayer risk—an important goal for the Administration.

litigate every single notice of rescission, even if the claim is patently without merit. The cost of eradicating a single rescission claim is substantial and would add significantly to the cost of servicing the assets.

## SUMMARY OF ARGUMENT

The Truth in Lending Act provides borrowers with "the right to rescind [certain home mortgage transactions] until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section . . ., whichever is later." 15 U.S.C. § 1635(a). Thus, if a borrower gives notice within the first three days, his right to rescind is unconditional; the borrower may seek rescission for any reason. Where the borrower seeks to rescind after the first three days, however, defective TILA disclosures are a condition-precedent. Regardless of whether the required disclosures were made, "an obligor's right of rescission shall expire three years after the date of consummation of the transaction . . . ." 15 U.S.C. § 1635(f).

At issue in this case is what steps must be taken by the borrower within the three-year repose period prescribed by 15 U.S.C. § 1635(f). An analysis of the necessary implications of Petitioners' position and the basis for the remedy of rescission demonstrate the falsity of the underlying premise of Petitioners' position—that mere notice is sufficient to effect the result. A ruling that rescission is effectuated upon mere notice from the borrower, when the underlying right to rescind is disputed by

the creditor, would have a detrimental effect on the residential mortgage market and private label RMBS securitization. Consumers would face little to no risk to send notices of intention to rescind, which would likely drastically increase, leading to more litigation and, inevitably, higher costs for residential mortgage financing and more disputes amongst transaction parties to a securitization.

Petitioners' position would have serious implications for the private label RMBS market, as it would call into question standard R&Ws regarding pooled mortgages and the validity of the security interest in the underlying collateral.[3] The RMBS market is finally on the path to rebuilding, but it needs predictability to recover to healthy levels and to lessen the burden on the taxpayer. In 2005, private label mortgage securities infused over $1,120 billion in capital into the mortgage market. In 2013, as a result of diminished investor confidence and an increase in expenses for participants, that number

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3 For mortgage loans included in a recent publicly registered RMBS, the percentage of mortgage loans in that deal which could have been subject to TILA rescission—refinance mortgage loans—was over 50%-similar to other transactions. For example, in Sequoia Mortgage Trust 2013-8, the disclosed percentage of mortgage loans which were refinance mortgage loans at the time of the closing of the transaction was 62.22%. Prospectus Supplement dated June 12, 2013 (To Prospectus dated April 24, 2013) *available at* http://www.sec.gov/Archives/edgar/data/1176320/000114420413034658/v347661_424b5.htm. TILA rescission could also apply to mortgage loans other than refinance loans which also may be securitized.

dropped to less than $16 billion, a decrease of nearly 99%. A determination that a creditor's security interest is voided immediately upon notice may make many of these mortgage loans ineligible for securitization, if they have not been contributed to an RMBS, or if already included in an RMBS, will impose additional costs and burdens on originators, issuers, trustees, servicers and ratings agencies, thereby causing further trepidation among investors. The end result will inevitably have a negative impact on the private label RMBS market, an essential source of core funding for the economy.[4]

Petitioners' position also presents a panoply of uncertainties for participants in the RMBS market. For example, are trustees required to treat a notice of intention to rescind as a breach of the R&Ws and pursue remedies to remove that loan from the RMBS pool? What if there is no repurchase remedy for a loan in the trust? Will the RMBS be downgraded? Will bank holders of private label RMBS be required to adjust their capital requirements as a result of a downgrade? Are servicers required to notify trustees, and trustees required to notify sellers and investors in RMBS as soon as a borrower provides notice of intent to rescind? Moreover, how would the loan be serviced if it is determined that it is no

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4 Petitioners' position could also have a negative impact on mortgage loans sold to GSEs for securitization as well as other mortgage originators that may have loans in their portfolio i.e., on their balance sheet. Mortgage participants typically engage in a "best execution" analysis to determine if securitization through the private label securities market, holding loans on balance sheet, or selling loans to the GSEs is the best option.

longer secured by real property? Which is "the most relevant statute of limitations from state law," Br. for Petitioners at 43, and how will the application of common law defenses such as laches, waiver, and estoppel vary by state? How should investors value a residential mortgage loan or an RMBS containing loans from a state with a one-year statute of limitations compared to loans from a state with a six-year statute of limitations, and how will those differences in valuations impact the availability of financing in different states? These ambiguities would cast a cloud over the entire residential mortgage market.

Petitioners' erroneous position will dramatically increase legal disputes. In addition to the inevitable litigation that will arise out of the questions discussed above, Petitioners' underlying premise will force servicers to litigate every single notice of intention to rescind, no matter how untenable and unsubstantiated. The risks associated with the mortgage loan becoming unsecured are dramatic, as are the costs associated with the potential of providing, in essence, an interest-free loan.

This Court's recent discussion regarding the nature of statutes of repose confirms that when a borrower seeks to rescind his mortgage loan and the lender disputes the borrower's right to rescind, the borrower must bring a suit for rescission within the three-year period provided by 15 U.S.C. § 1635(f). Any claims brought under § 1635 after the three-year repose period, no matter how they are crafted,

are improperly seeking an award of rescission on the basis of a right that no longer exists.

Enacted in 1974 to combat the uncertainty created by unexpired rights of rescission, 15 U.S.C. § 1635(f) provides that the right "shall expire" three years after consummation of the loan. 15 U.S.C. § 1635(f). By enacting § 1635(f), Congress struck a balance between consumer protection and the need for certainty in the residential mortgage and real estate markets: Consumers are entitled to rescind in certain circumstances for up to three years, but after that date a lender can be confident in its secured creditor status.[5] The position espoused by Petitioners would upset this balance and largely defeat the purpose of § 1635(f).

According to Petitioners' interpretation, a borrower need only provide notice of an intent to rescind within three years of consummation of the mortgage and, if the transaction happens to have occurred within the state of Minnesota (as in the instant case), the borrower has *another* six years to bring a suit for rescission. That's nine years in total (in stark contrast with the one-year statute of limitation provided by Section 1640 for damages for other violations of TILA). Further, Petitioners argue that the actual rescission itself, including the voiding of the creditor's security interest in the underlying property, is effective *immediately* upon the borrower's notice. Even when the right of rescission is disputed by the lender, mere notice could relegate

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[5] Consumers also lose the right to rescind if their loan is paid off or the property is sold. 15 U.S.C. § 1635(f).

the creditor to unsecured status, and potentially provides the borrower with an interest-free loan retroactive to consummation up until the matter is litigated. Many lower courts have wisely recognized that this is an "untenable proposition." *See Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 54-55 (1st Cir. 2002).

Petitioners' position conflicts with this Court's recognition that § 1635(f) is a statute of repose, *see Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417-18 (1998), and disregards the purpose of statutes of repose. As this Court recently noted, "[l]ike a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability." *CTS Corp. v. Waldburger*, 189 L. Ed. 2d 62, 72-73 (2014). The creation of a protracted, and perhaps indefinite, period in which a borrower may bring a rescission suit would defeat Congress's intent to provide lenders with "freedom from liability" after three years.[6]

For the reasons summarized above and discussed below, SFIG respectfully asks the Court to affirm the majority rule and find that where a borrower's right to rescind is disputed, he must bring a suit for rescission within the three-year repose period set forth in 15 U.S.C. § 1635(f).

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[6] This Court recognized that Congress's concern for commercial certainty led it to establish the fixed and limited repose period of § 1635(f). *See Beach*, 523 U.S. at 418 ("when Congress amended the Act in 1995 . . . it took care to provide that any such liberality was subject to the three year time period provided in subsection (f)").

## ARGUMENT

Respondents argue that where the borrower's right to rescind is contested, the borrower must sue for rescission within TILA's three-year statute of repose. To that end, SFIG agrees in full with Respondents that the Petitioners' rescission claim is time-barred.

### I. WHERE A BORROWER'S RIGHT OF RESCISSION IS DISPUTED BY HIS CREDITOR, MERE NOTICE OF A BORROWER'S INTENT TO RESCIND DOES NOT AUTOMATICALLY RESCIND THE MORTGAGE.

Petitioners' argument is based on the false premise that under § 1635, a borrower's mere notification to the creditor is sufficient to effectuate a rescission, even when the existence of a condition-precedent (deficient disclosures) of the underlying right of rescission is disputed. The Court should reject this position for three reasons. First, the necessary implications are so absurd that Congress could not have intended such a scenario. Second, it would result in increased litigation, straining our already overburdened federal courts and increasing the costs of obtaining residential financing. And third, it is inconsistent with the equitable remedy of rescission and corollary equitable principles such as clean hands.

#### A. Petitioners' Position Has Serious Negative Implications On The

**Private Label RMBS Market As Well As The Residential Real Estate Market More Generally.**

Petitioners' position is based on the dangerous assumption that where required TILA disclosures are alleged to have been deficient, a rescission is effective immediately at the time a borrower provides his creditor with notice of an intent to rescind. Notice alone is sufficient so long as it is made within three years after consummation, regardless of whether the right of rescission is disputed by the lender. This could not have been Congress's intent. *In re Chapman*, 166 U.S. 661, 667 (1897) ("nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion").

If a rescission is held to be immediately effective upon mere notice of a borrower's intent to rescind, then a creditor's status as a secured party is likewise placed in jeopardy upon mere notice of a borrower's one-sided intent. *See* 15 U.S.C. § 1635(b). Indeed, Petitioners acknowledge this result. *See Petitioners' Petition for Writ of Cert.* at 21 ("upon such a rescission that a borrower exercises by notifying his creditor, any security interest becomes void") (internal quotations omitted). In light of the hyper-technical nature of TILA, *see, e.g. Handy v. Anchor Mortgage Corp.*, 464 F.3d 760, 764 (7th Cir. 2006) ("TILA does not easily forgive 'technical' errors."), it would be difficult for creditors to confidently conclude whether or not the borrower

has a valid right of rescission upon receipt of the notice and, in turn, whether its security interest is still valid. This secured-creditor-limbo has the potential to have a severe impact on the private label RMBS market and a heightened impact on the residential mortgage market more generally.[7]

### 1. Overview of the RMBS securitization process.

In order to fully appreciate the impact that Petitioners' position would have on the residential mortgage market, it is essential to have an understanding of the structure of, and parties involved in, the private label RMBS securitization process.

The life of a mortgage loan begins at origination. An "originator", or lender, is the entity that actually makes a mortgage loan. An originator also processes a borrower's loan application and is responsible for making the required TILA disclosures. In exchange for making the loan, the originator receives a mortgage from the borrower, which provides the originator with a security interest in the borrower's property.

After origination, an originator may choose to retain the mortgage loan on its balance sheet, to pool it with other mortgage loans in an RMBS, or to sell

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[7] *See Yamamoto v. Bank of New York*, 329 F.3d 1167, 1172 (9th Cir. 2003) ("[I]t cannot be that the security interest vanishes immediately upon the giving of notice. Otherwise, a borrower could get out from under a secured loan simply by claiming TILA violations.").

the mortgage loan to a third-party, who may either retain the mortgage loan or pool it with other mortgage loans in its own RMBS. If the mortgage loan is securitized in an RMBS, it is sold by the party initiating the securitization (typically referred to as the "sponsor") to a special purpose entity called the "depositor," pursuant to a mortgage loan purchase agreement ("MLPA"). In the MLPA, the sponsor makes various R&Ws about various features of the mortgage loans. The rights of the depositor with respect to the MLPA are then assigned to the securitization trust, or "issuer", which issues the RMBS. The RMBS is backed by payments on the pool of mortgage loans. A "trustee" is then appointed to handle various tasks with respect to the pool of loans contained in the trust.

After securitization, an "underwriter" purchases the RMBS from the trust to resell to investors. Before resale, the RMBS generally receives a credit rating from a rating agency. The rating agency gives an RMBS its rating based on an evaluation of data on each loan held by the trust (e.g., principal amount, location of the property, credit history of the borrower, ratio of the loan amount to the value of the underlying collateral, and lien priority) and the R&Ws, among other things. The rating agency is required to compare the R&Ws against their stated criteria and to file a report showing the differences, if any, between the R&Ws made by the sponsor and its standard R&Ws. Credit ratings inform investors about which RMBS are most appropriate given their respective tolerances for risk.

Another important entity in the RMBS process is the "servicer." The relationship between the trustee and servicer is generally governed by a "pooling and servicing agreement" ("PSA"). The servicer is responsible for processing payments and interacting with borrowers, implementing the collection measures prescribed by the PSA and, if needed, liquidating the collateral in the event of default. After a servicer processes payments, the proceeds are forwarded to the trustee, who distributes them to the investors. As part of its duties, under accepted servicing practices, the servicer in an RMBS would be required to attend to rescission claims from borrowers in a manner consistent with customary standards of the jurisdiction in which the mortgaged property is located.

Through the RMBS process, all investors, from institutional investors to individuals, have access to the residential mortgage market. In turn, this collection of private capital provides lenders with additional funds for their mortgage lending divisions and much-needed liquidity to the market, making financing more available to homeowners nationwide.[8] The private capital infused by the

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[8] Without private capital, banks are dependent on their deposit base for funding of non-GSE conforming mortgages. These same deposits fund other assets such as credit card receivables and auto loans. The return on competing assets may be greater than mortgages, creating an economic disincentive to funding mortgages. Furthermore, the deposit base may shrink at any time. As such, certain originators are dependent upon private capital to fund originations, and private capital provides much needed liquidity to the residential mortgage market.

secondary market for RMBS is particularly important for non-agency borrowers, who may not qualify within the parameters of a GSE-backed mortgage loan. Indeed, originators often make mortgage loans fully anticipating that they are not eligible for purchase by a GSE and will ultimately be part of a private label RMBS transaction.

### 2. Petitioners' position would have a chilling effect on the private label RMBS market.

A determination that mere notice is sufficient to effect a rescission would reverberate through all segments of the RMBS market, creating significant hurdles for originators, issuers, ratings agencies, servicers, and trustees alike, while breeding doubt among investors regarding the value of future and already-issued private label RMBS.

As previously discussed, the R&Ws are important elements of the securitization process. The quality and extent of an originator's R&Ws provide issuers and investors with confidence in the value of the security and have a significant impact on the RMBS's credit rating. Specifically, ratings agencies seek R&Ws that provide assurances regarding the origination and underwriting quality of the pool of loans. For example, one rating agency expects to see the following R&Ws, among others, when rating RMBS securities:

> The mortgage is a valid, subsisting and enforceable first lien on the property therein described and, except as noted in the

> mortgage loan schedule, the mortgaged property is free and clear of all encumbrances and liens having priority over the lien of the mortgage . . . .
>
> At the time of origination or, if subsequently modified, the effective date of the modification, each mortgage loan complied in all material respects with all then-applicable federal, state and local laws including, without limitation, truth-in-lending, real estate settlement procedures, consumer credit protection, equal credit opportunity, predatory and abusive lending laws and disclosure laws . . . .
>
> No mortgage note or mortgage is subject to any right of rescission, set-off, counterclaim or defense . . . .

Representations and Warranties Criteria for U.S. RMBS Transactions, DBRS, May 2014, *available at* http://www.dbrs.com/research/267566/representations-and-warranties-criteria-for-u-s-rmbs-transactions.pdf. Thus, where a borrower provides an originator with notice of an intent to rescind after the three-day rescission period but before the originator has sold the mortgage to an issuer—no matter how untenable or unsubstantiated the purported right to rescind may be—the loan would be ineligible for securitization, as it would violate these standard representations.

For a mortgage loan which has already been included in an RMBS, it would be expected that the servicer, upon being provided a notice of intention to

rescind, would inform the trustee. Thereafter, the purported rescission could be treated as a breach of the R&Ws and a repurchase remedy would be sought. A sponsor might be eager to repurchase the loan for reputational reasons, and it may also want to remove the loan from the trust to defend the notice of intention to rescind more effectively. Regardless, rescission or attempted rescission would have serious ramifications for the securitization, as the various parties thereto would have to analyze a complex and difficult situation, with significant litigation risk. *See supra*, pp. 15-16. All of these issues would arise even if the trigger was an untenable and unsubstantiated notice of rescission.

Representation and warranty disputes have been significant after the credit crisis and an adverse ruling would have the potential to exacerbate disagreements. These disputes have led to considerable uncertainty in the market and have adversely affected the flow of private capital. SFIG has previously filed letters with the Treasury Department addressing some of these issues.[9] In addition, SFIG is currently attempting to address these issues through its RMBS 3.0 project, which involves a large group of securitization transaction parties, including issuers and investors, working together to create a new paradigm for the resolution of disputes concerning representations and warranties.[10] Also, the SEC in its recent release

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9 *See* Letter from SFIG to U.S. Department of Treasury (Aug. 11, 2014), *available at* http://www.regulations.gov/#!documentDetail ;D=TREAS-DO-2014-0005-0028.

10 *See id.*

regarding Regulation AB mandated another paradigm for the resolution of representation and warranty disputes for publicly registered securitizations.[11] All of these efforts to create a new and viable market could be thrown into jeopardy by Petitioners' position, due to the likelihood that it would generate an increased number of alleged breaches of representations and warranties and create additional repurchase disputes between transaction parties.

Relatedly, the possibility that a rescission has already been effected by a borrower's mere notice will increase the due diligence costs to issuers of RMBS. Investors and ratings agencies understandably place significant due diligence requirements on issuers to ensure the value of the RMBS. The burden and expense of proving, loan-by-loan, that a borrower has not provided a notice of rescission (which, under Petitioners' position, would be necessary to have any confidence in the enforceability of the security interest) could have a substantial impact on profitability and incentive for issuing RMBS. *See Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2823 (2011) ("it is never easy to prove a negative").

The process of evaluating breaches of R&Ws places additional costs on trustees, decreases the incentive for originators to make loans they would not otherwise make and, if such loans are included

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11 *See* Asset-Backed Securities Disclosure and Registration (adopted on Sept. 4, 2014) (to be codified at 17 C.F.R. pts. 229, 230, 232, 239, 240, 243, and 249), *available at* http://www.sec.gov/rules/final/2014/33-9638.pdf.

in private label RMBS, increases the likelihood of litigation between originators, issuers, trustees, and investors. Because of the serious implications of an instantaneous cancellation of a security interest, these consequences would arise from any and all notices of intent to rescind, including ones without true merit.

Under Respondents' interpretation (and the holding of the Eighth Circuit) wherein a borrower's notice of intent to rescind does not immediately effect a rescission where the underlying right of rescission is disputed, trustees can wait to enforce a repurchase agreement until after the servicer either agrees with the borrower's intended rescission or, if the right of rescission is disputed, a determination is made by an appropriate court. This prudent interpretation of § 1635 ensures that a potentially frivolous assertion of a right to rescind neither diminishes the value of mortgage loans nor exposes RMBS participants to expensive and unnecessary put-back claims.

### 3. Petitioners' position could have a significant adverse impact on the risk-based capital treatment of RMBS.

In addition to the chilling effect that it would have on the residential real estate market's access to private capital more broadly, Petitioners' position has the potential to adversely affect investment in RMBS. The treatment of RMBS held by banks for regulatory capital purposes is sensitive to the ratings of such RMBS. In the event that RMBS are

downgraded as a result of borrower's resorting to a rash of notices of intention to rescind, the amount of capital that banks would be required to hold against RMBS held in portfolio could be increased. *See* 12 C.F.R. pt. 3, app. A, § 4 (3)(1). This would be in addition to the substantial increase in capital required for residential mortgage loans held in whole loan format, which would increase from 50% to 100%. *Compare* 12 C.F.R. pt. 3, app. A, § 3 (a)(3)(iii) (providing a 50 percent risk weight to loans secured by certain first mortgages on one-to-four family residential properties) *with* 12 C.F.R. pt. 3, app. A, § 3 (a)(4) (applying a 100 percent risk weight to all other assets).

The impact of a ruling that recognizes immediate rescission upon notice, regardless of whether the right to rescind is disputed, will be felt by all participants in the RMBS market:[12]

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[12] The *Amici* States argue that "the potential for rescission also gives the secondary mortgage market strong incentives to police loan originators to prevent threshold TILA violations." Br. for the State of New York, et al., at 21. This is unrealistic. It would be exceedingly difficult and expensive for participants in the secondary mortgage market to investigate as to each loan the adequacy of the TILA disclosures in its portfolio of RMBS. Indeed, even the *Amici* States recognize the "exceedingly difficult" task of discovering a TILA violation on the face of the loan disclosure statements. *Id.* Furthermore, the *Amici* States' suggestion that secondary market participants "police" originators misses the point. Under Petitioners' position, it does not matter to an investor whether a rescission is valid, and thus whether an originator actually acted appropriately. The *mere risk* of a frivolous notice of intention to rescind is too great and will inevitably result in repurchase demands on the trustee and litigation.

Originators will be unable to include in a pool any mortgage for which a notice of intention to rescind was received no matter how frivolous and will have less confidence that the loans it originates will ultimately be resold to an issuer; trustees will be burdened with increased expenses associated with mortgage loan repurchase claims; and servicers will be confronted with the expense of determining on a loan-by-loan basis whether a borrower provided a notice of intention to rescind, and, if so, whether the borrower actually possessed a right to rescind. However, given the recent deluge of R&Ws-related litigation and the severe risks of becoming an unsecured creditor, participants in the RMBS market cannot afford to wait for rulings on the declaratory judgment actions proposed by Petitioners, but must act under the possibility that the notice of rescission is valid. Petitioners' position would have negative implications on other participants in the residential real estate market as well. For example, potential purchasers would shy away from buying homes through non-judicial foreclosure where a frivolous right of rescission may remain un-litigated. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 418 (1998) ("a statutory right of rescission could cloud a bank's title on foreclosure").

The securitization of mortgages infuses additional capital into the residential mortgage market, making it easier for borrowers to obtain financing on favorable terms. Should the market for private label RMBS become impeded by uncertainty, issuers will have fewer potential purchasers and less of an incentive to originate, raising additional

barriers to credit for consumers in a market in which lending standards are already strict and out of reach for many first time homebuyers, the under-employed, those with damaged credit, and low- and moderate-income borrowers. The uncertainty that may arise if Petitioners' position is accepted adds another cost and hurdle in the form of threatened litigation, which could ultimately drive originators away from the recovering market.

### B. Petitioners' Position Would Dramatically Increase The Amount of TILA Rescission-Related Litigation.

An interpretation that rescission may be had by naked notice, even when the right to rescission is disputed by the lender, will inevitably lead to a dramatic increase in the amount of TILA rescission-related litigation. Under Petitioners' interpretation, lenders and servicers will be forced to litigate every notice of rescission, lest they run the risk of the loan becoming unsecured (*see supra* Part I.A.), or to avoid the risk of providing the borrower with an indefinite (or at least extended) interest-free loan.

15 U.S.C. § 1635(b) provides that "within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down-payment, or otherwise." Even where the borrower has not been harmed by the failure to make all necessary disclosures, the borrower is entitled to a return of all interest payments made prior to rescission. *See, e.g.*, *In re Regan*, 439 B.R. 522, 534 (Bankr. D. Kan. 2010)

(holding that borrower was entitled to payments even where TILA violation "caused no harm or prejudice to Debtors."). Thus, rescission provides the potential for significant pecuniary gain on the part of a borrower. However, TILA is at heart a consumer *notice* statute intended to provide uniform data about the loan transaction and the true cost of the credit being extended. TILA is technical and can be easily violated, hence the $35 tolerance rule in TILA for *de minimis* computation errors. *See* 15 U.S.C.A. § 1635(i). It is incompatible with TILA's disclosure focus and tolerance for mistakes unlikely to have impacted the consumer decision, to interpret TILA as calling for windfall damage awards to borrowers.[13]

In fact, Congress opted to alleviate creditors of the financial risks associated with an indefinite right of rescission when it enacted § 1635(f) and its three-year statute of repose. Allowing a borrower to effect a rescission by mere notice, and to then bring a "declaratory suit", *see* Br. for Petitioners at 40, many years after the right to rescind has expired, creates a strong incentive for *all borrowers* to send a notice of

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[13] An extreme example would be a borrower that sent a rescission letter within three years but did not bring a rescission suit until the conclusion of his 30-year mortgage. For a $300,000 mortgage at 10%, the borrower will have paid $647,777.30 in interest over the 30 years on top of the $300,000 of principal. If the borrower is successful in its rescission action, the creditor would be forced to return the $647,777.30 to the borrower, thus having provided the borrower with a 30-year interest free loan. This reality demonstrates why TILA rescission has been referred to as the "most draconian remedy." 141 Cong. Rec. S14566, 14567 (statement of Senator D'Amato).

rescission just prior to the expiration of the three-year statute of repose, in the hopes that he or she may have an interest-free loan.

Of course, this potential windfall to borrowers creates a corresponding risk to creditors with little risk or cost to the borrower. *See Sherzer v. Homestar Mortgage Servs.*, 707 F.3d 255, 267 (3d Cir. 2013) ("permitting obligors to rescind by written notice could potentially impose additional costs on banks, as it costs little for an obligor to send a letter to the lender"). Creditors will likely find that the possibility of providing a borrower with an interest-free loan for many years, when paired with the unsecured creditor complications and R&Ws-related litigation risks discussed above, renders the risk of an outstanding and un-litigated notice of rescission too great to reasonably accept, no matter how confident they are that the borrower lacks the right to rescind, leading to unnecessary litigation. In addition to the significant strain that these cases place on our over-burdened federal courts, the costs of additional litigation will only make residential mortgages more expensive. *Id.* ("This may, in turn, be more costly for borrowers insofar as lenders—like all businesses—pass along costs occasioned by regulation or taxation to their customers.").

Conversely, should the Court agree with Respondents that mere notice of an intent to rescind does not effectuate a rescission, there is little risk that a creditor will try to "outwait" the three-year repose period of § 1635(f). As acknowledged by the CFPB, "[a]n obligor may sue for damages under Section 1640 for a creditor's failure to follow the

unwinding procedures of Section 1635(b)". Br. for United States at 14.

### C. Petitioners' Position Is Inconsistent With The Common Law Remedy Of Rescission.

The United States of America, as *amicus curiae*, argues for immediate rescission upon notice by drawing an analogy between the right of rescission provided under § 1635 and the common law doctrine of rescission at law. This analogy backfires. Unlike the right of rescission provided by TILA, the remedy of rescission at law requires tender by the borrower ***at the time he provides his notice of rescission***. This is no small distinction.

The remedy of rescission cannot be had without the balanced scales of equity. *See Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1184 (10th Cir. 2012) ("Rescission in its most basic form is an equitable remedy designed to return the parties to the status quo prevailing before the existence of an underlying contract."). Thus the maxim, "he who seeks equity must do equity." *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1947). Under the remedy of rescission, if a borrower would like the mortgage loan transaction to be unwound and the lien voided, then he must pay back the borrowed funds.

In fact, several of the cases cited by the United States specifically acknowledge the necessity of a tender to effectuate a rescission at law. *Douglass v. Nationwide Mut. Ins. Co.*, 913 S.W.2d

277, 282 (Ark. 1996) ("In Arkansas, rescission of a contract at law is accomplished by *the rescinding party's tendering the benefits received to the contracting party*, and the courts have nothing to do with the repudiated transaction.") (emphasis added); *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1322 (9th Cir. 1998) ("Under California law, a party to a contract can rescind it and such rescission can be accomplished by the rescinding party by giving notice of the rescission *and offering to restore everything of value which the rescinding party has received.*") (emphasis added); *Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 445 (4th Cir. 2004) ("A rescission is an avoidance of a transaction . . . . Except as the parties might agree to the contrary, *rescission will normally be accompanied by restitution on both sides.*") (emphasis added); *see also Maumelle Co. v. Eskola*, 865 S.W.2d 272, 274 (Ark. 1993) ("rescission at law is accomplished when one party to a contract tenders or returns to the other party the benefits received under the contract"). The doctrine of rescission at law seeks to return the parties to their respective positions *ex ante*. Because TILA does not require an immediate tender at the time the borrower provides his notice of intention to rescind, it makes perfect sense that a rescission is not automatic where the right to rescind is disputed. An interpretation to the contrary would leave the borrower with the loan proceeds and the creditor with no security interest—hardly a reset to the parties' original positions.

In fact, an interpretation of § 1635 that does not provide for rescission upon mere notice resolves

other tender-related issues that would arise under Petitioners' position. For example, if rescission is immediate upon mere notice even where the right to rescind is disputed, what happens to the creditor's security interest if the borrower fails to tender? Does it immediately go back into existence? What happens to other creditors that gain a security interest in the same property after the borrower provided a notice of intention to rescind, but before the borrower failed to tender? Are they junior or senior to the original creditor? These are real concerns, not mere speculation. Creditors have already been confronted with suits filed many years after the borrower provided notice of rescission. *See Nix v. Option One Mortg. Corp.*, No. Civ. 05-03685, 2006 U.S. Dist. LEXIS 2289, at *2-3 (D.N.J. Jan 19, 2006) (borrower provided notice of rescission in 1998 but did not file a lawsuit until 2005). Some courts have remedied this issue by requiring that borrowers prove an ability to tender before granting rescission.[14] Petitioners' position of immediate rescission upon notice would eliminate the ability of courts to take such an action because under their analysis any post-notice suit is merely a suit for

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[14] *See, e.g., Yamamoto v. Bank of New York* 329 F.3d 1167, 1170 (9th Cir.2003) (acknowledging that "rescission *should be* conditioned on repayment of the amounts advanced by the lender") (emphasis in original); *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137, 1142 (11th Cir. 1992) ("In deciding whether or not to impose conditions upon [the borrower], the district court should consider traditional equitable notions, including such factors as the severity of [the creditor's] TILA violations and whether [the borrower] has the ability to repay the principal amount.").

declaratory judgment, and the rescission—and the concomitant voiding of the creditor's security interest—has already been effected.[15]

## II. SECTION 1635(F) IS A STATUTE OF REPOSE THAT BARS ALL ACTIONS PREMISED ON A BORROWER'S RIGHT TO RESCIND AFTER THREE YEARS.

This Court has previously recognized that § 1635(f) is not merely a statute of limitations, *see Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998), but is a statute of repose that by its "plain language" states that a borrower's right to rescind shall not be "'***enforceable in any event*** after the prescribed time.'" *Id.* at 416 (emphasis added) (quoting *Midstate Horticultural Co. v. Pennsylvania R. Co.*, 320 U.S. 356, 360 (1943)). And as a statute of repose, "Section 1635(f) . . . takes us beyond any question whether it limits more than the time for bringing a suit, *by* governing the life of the underlying right as well." *Beach*, 523 U.S. at 417. As a rescission cannot be had by mere notice where

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[15] Congress clearly intended that courts would play an active role in the rescission process. Section 1635(b), which includes the provision that "any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission", also states that "the procedures prescribed by this subsection shall apply except when otherwise ordered by a court." A determination that rescission is had immediately upon notice from the borrower conflicts with Congress's grant of judicial discretion. In fact, many courts have held that "[v]oiding a security interest is one of the procedures that may be modified to effect rescission." *See In re Regan*, 439 B.R. 522, 534 (Bankr. D. Kan. 2010).

the right to rescind is disputed by the lender (*see supra* Part I), any action under 1635 ***must*** be an action for rescission, and thus barred if brought more than three years after consummation. Likewise, even if this Court were to find that mere notice does immediately result in rescission, any suit would still be an action to enforce a right of rescission—a right that no longer exists after 1635(f)'s three-year statute of repose has run.

Statutes of repose, such as § 1635(f), "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time," *CTS Corp. v. Waldburger,* 134 S. Ct. at 2183 (internal citations omitted), and "embod[y] the idea that at some point a defendant should be able to put past events behind him." *Id.* (citing *Jones v. Thomas*, 491 U.S. 376, 392 (1989) (SCALIA, J., dissenting)). In seeking to avoid application of the statute of repose, Petitioners ignore the plain language of 1635(f) and this Court's analysis in *Beach.*

Section 1635(f) states that "[a]n obligor's right of rescission shall expire three years after the date of consummation." *Beach* recognized that this provision "governs the life of the . . . right." *Beach*, 523 U.S. at 417. Petitioners seek to avoid the plain language of 1635(f) and *Beach* by arguing that 1635(f) "makes no mention of a lawsuit and 'talks not of a suit's commencement but of a right's duration'". Br. for Petitioners at 40 (quoting *Beach*, 523 U.S. at 417). It is axiomatic, however, that there can be no viable claim where there is no underlying right.

If, as Petitioners assert, a suit brought after the borrower already provides notice is a "suit to enforce rescission", Br. for Petitioners at 46, it is barred when brought more than "three years after the date of consummation." As previously noted by this Court, § 1635(f) renders a borrower's right to rescind "***[un]enforceable*** in any event after the prescribed time.'" *Beach*, 523 U.S. at 417 (emphasis added) (quoting *Midstate*, 320 U.S. at 360). To allow a borrower to proceed with a "suit to enforce rescission" after the three-year period would completely ignore this Court's ruling in *Beach* as well as its recent analysis of the purposes of statutes of repose. *See CTS Corp.*, 134 S. Ct. at 2183 (stating that statutes of repose allow defendants "a fresh start" and allow them "to put past events behind him").[16]

Avoiding § 1635(f) by arguing that a borrower's post-notice suit merely seeks a declaratory judgment is equally as untenable and inconsistent with the limitations of declaratory judgment proceedings. Hypothetically, a court could decree that the loan was already rescinded and that the creditor's security interest was already void. However, a declaratory judgment may only state what *is*. A declaratory judgment may not order the

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[16] The United States focuses on alleged hardships that treating § 1635(f) as a limit for filing suit would have on borrowers. However, unlike statutes of limitation, which allow tolling when "extraordinary circumstance prevents [a plaintiff] from bringing a timely action," statutes of repose are defendant-facing and seek to "provide a fresh start or freedom from liability." *See CTS Corp.*, 134 S. Ct. at 2183.

borrower to tender the loan proceeds or order the creditor to "return any money or property given as earnest money, down-payment, or otherwise" or to "take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." 15 U.S.C. § 1635(b); *see also King v. United States*, 390 F.2d 894, 904 (Ct. Cl. 1968) ("Since no performance by, or execution on, the defendant is sought in a prayer for declaratory relief, no further mechanism for the satisfaction of the plaintiff's claim is required when a court grants a declaration.") *rev'd on other grounds*, 395 U.S. 1 (1969). Such steps are part of the rescission process and embedded within the rescission remedy, which is terminated three years after consummation. The absurdity of a statutory scheme that allows for immediate cancellation of a security interest upon naked notice, while potentially exposing other aspects of the process to a repose period, is further evidence that Congress could not have intended that a rescission is effective immediately upon mere notice from the borrower where the underlying right to rescind is disputed.

Having already argued that § 1635(f) does not apply to their actions to "enforce" the right of rescission and recognizing the absurdity of an indefinite period during which a borrower may seek a rescission so long as notice was made during the first three years, Petitioners offer an alternative limitations period: Minnesota's six-year limitations period for suits "upon a liability created by statute" on the grounds that it is the most analogous statute of limitations under state law. Br. for Petitioners at

44 (quoting Minn. Stat. Ann. § 541.05, subd. 1(2)).[17] By claiming that the most analogous statute of limitations is one applicable to "a liability created by statute," Petitioners betray their own argument that a borrower's suit following notice is merely an action for a declaratory judgment, and is not covered by the 1635(f) statute of repose. Thus, no matter how an action to enforce the right to rescind is phrased, it is barred three years after consummation.

17 Using a six-year statute of limitations period means the lender may have to refund an additional six years' worth of interest payments.

## CONCLUSION

For the reasons set forth above, SFIG respectfully requests that the Court reject the arguments of the Petitioners and affirm the ruling of the majority of courts holding that where a borrower's right of rescission is disputed by the creditor, a borrower must file an action for rescission within three years from the date of consummation of the mortgage transaction.

Respectfully submitted,

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